

No.

2150

United States Circuit Court of Appeals  
for the ~~NO~~ Ninth Circuit.

UNITED STATES OF AMERICA,  
*Plaintiff in Error.* }  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
*Defendant in Error.* }

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division.

RECEIVED

Lowman & Hanford Co., Seattle

FILE

DEC 9 - 191



No.

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UNITED STATES OF AMERICA,  
*Plaintiff in Error.*}  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
*Defendant in Error.*}

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## TRANSCRIPT OF RECORD

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Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division.



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*In the District Court of the United States for the Western  
District of Washington. Northern Division.*

UNITED STATES OF AMERICA,  
                        *Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
                        *Defendant.* }  
                        } No. 1933.

NAMES AND ADDRESSES OF COUNSEL.

BEVERLY W. COINER, Esq.,  
Room 310 Federal Building, Seattle, Washington. Attorney  
for Plaintiff in Error.

CHARLES F. RIDDELL, Esq.,  
Room 310 Federal Building, Seattle, Washington. Attorney  
for Plaintiff in Error.

J. A. KERR, Esq.,  
1309 Hoge Building, Seattle, Washington. Attorney for  
Defendant in Error.

S. H. KERR, Esq.,  
1309 Hoge Building, Seattle, Washington. Attorney for  
Defendant in Error.

E. S. McCORD, Esq.,  
1309 Hoge Building, Seattle, Washington. Attorney for  
Defendant in Error.

*United States Circuit Court Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff.*, }  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation, }  
*Defendant.*, } 1933.

COMPLAINT.

For a cause of action against the defendant the plaintiff states:

I.

That the defendant is, and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the United States relating to the organization of national banks, and engaged in such banking business as a national bank at the city of Seattle, in said Western District of Washington.

II.

That during the years of 1907, 1908 and 1909, one M. P. McCoy was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said times this plaintiff deposited, and caused to be deposited with the defendant, large sums of money to the credit of the said McCoy, to be by him used solely for the purpose of making payment of the expenses which he might be authorized to incur for the plaintiff as such Examiner and Special Disbursing Agent.

III.

That said deposits were so made with said defendant as a Government depository, and in accordance with the statutes of the United States, and the regulations of its Treasury Department relating to deposits and disbursements of public moneys.

## IV.

That said McCoy did, at various times as hereinafter set forth, illegally, fraudulently, and without any authority from this plaintiff, draw checks on the defendant aggregating in amount the sum of Fifteen Thousand One Hundred and Twenty-nine and 81/100 (\$15,129.81) Dollars, payable to the order of fictitious payees, and thereafter at various places in the State of Washington and in the State of Montana, forge the endorsements of the names of such fictitious payees, and afterward procured from various banks in said states for his own use the sums of money for which said checks were so drawn.

## V.

That the defendant, when said checks were presented to it from time to time, wrongfully and without authority from this plaintiff, charged the respective amounts thereof against the said deposits of this plaintiff.

## VI.

That a list of said checks showing their respective dates, amounts and names of payees, is hereto attached, marked exhibit "A" and by this reference made a part of this complaint.

## VII.

That said forgeries were not discovered by this plaintiff until on or about September 30, 1909, prior to which time of discovery, this plaintiff, relying upon the representations of the said defendant that said endorsements so made by said McCoy were genuine, had by mistake credited the said defendant with the said aggregate amount of said checks.

## VIII.

That upon making such discovery, plaintiff notified the defendant thereof, and thereafter, to-wit, on March 5, 1910, demanded of and from the defendant the payment of said sum of \$15,129.81, which had been so credited to the defendant by mistake on account of said forged endorsements.

## IX.

That defendant refused and still refuses to make payment of said amount, or any part thereof.

## X.

That there is now due and owing the plaintiff from the defendant on said account, the sum of Fifteen Thousand One Hundred and Twenty-nine and 81/100 (\$15,129.81) Dollars, together with interest thereon since March 5, 1910, at the rate of 6% per annum, which the defendant neglects and refuses to pay.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Fifteen Thousand One Hundred and Twenty-nine and 81/100 (\$15,129.81) Dollars, together with interest thereon at the rate of 6% per annum from March 5, 1910, until paid, and for its costs and disbursements herein.

ELMER E. TODD,  
United States Attorney.

W. G. McLAREN, ..  
Assistant United States Attorney.

The United States of America,  
Western District of Washington—ss.

W. G. McLaren being first duly sworn on oath deposes and says: That he is an assistant United States Attorney for said Western District of Washington, and is attorney for the plaintiff herein and makes this verification for and in its behalf; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

W. G. McLAREN.

Subscribed and sworn to before me this 22d day of December, 1910.

(Seal) W. D. COVINGTON,  
Deputy Clerk U. S. Circuit Court, Western District of Washington.

## Exhibit "A".

No.	Date.	Payee.	Amount.
1	Oct. 14, 1907	Albert Peterson	\$ 20.00
2	" 14, "	Nels Anderson	20.00
3	" 14, "	Wm. Jager	60.00
4	" 14, "	H. Berggren	47.50
5	" 31, "	F. L. Day	28.00
6	" 31, "	G. Hoge	28.00
7	" 31, "	Frank Engberg	96.00
8	" 31, "	Chas. Lund	78.75
9	" 31, "	J. D. King	62.00
10	" 31, "	F. M. Clark	62.00
12	Nov. 30, "	F. L. Day	52.50
13	" 30, "	G. Hoge	52.50
14	" 30, "	Frank Engberg	180.00
15	" 30, "	Chas. Lund	150.00
16	" 30, "	J. D. King	60.00
17	" 30, "	F. M. Clark	60.00
19	Dec. 31, "	F. L. Day	54.25
20	" 31, "	G. Hoge	54.25
21	" 31, "	Frank Engberg	186.00
22	" 31, "	Chas. Lung	155.00
23	" 31, "	F. M. Clark	62.00
24	" 31, "	J. D. King	62.00
26	Jan. 10, 1908	F. L. Day	17.50
27	" 10, "	G. Hoge	17.50
28	" 10, "	Frank Engberg	60.00
29	" 10, "	Chas. Lung	50.00
30	" 13, "	J. D. King	26.00
31	" 13, "	F. M. Clark	26.00
43	May 6, "	John Jabelson	27.50
44	" 6, "	John S. Cole	36.00
45	" 31, "	J. D. King	62.00
46	" 31, "	F. M. Clark	62.00
47	" 31, "	A. J. Whitney	54.25

No.	Date.	Payee.	Amount.
48	May 31, 1908	H. M. Benson	\$125.00
49	" 31, "	C. A. Thrapp	150.00
50	June 16, "	H. M. Benson	48.75
51	" 10, "	C. A. Thrapp	72.00
52	" 23, "	J. E. Scherer	78.00
53	" 23, "	H. M. Benson	63.75
54	" 30, "	J. D. King	69.33
55	" 30, "	F. M. Clark	60.00
56	" 30, "	A. J. Whitney	54.25
57	" 30, "	H. A. Moore	63.00
58	" 30, "	D. H. Sullivan	12.25
59	" 30, "	Geo. D. Cook	14.00
60	" 30, "	F. W. McCulley	14.00
61	" 30, "	S. F. Cady	12.25
62	" 30, "	H. M. Benson	54.00
2	July 31, "	J. D. King	100.00
3	" 31, "	F. M. Clark	62.00
4	" 31, "	Geo. D. Cook	62.00
5	" 31, "	F. M. McCulley	62.00
6	" 31, "	A. J. Whitney	62.00
7	" 31, "	H. A. Moore	279.00
8	" 31, "	D. H. Sullivan	54.25
9	" 31, "	S. F. Cady	54.25
10	" 31, "	H. M. Benson	248.00
12	Aug. 31, "	J. D. King	100.00
13	" 31, "	F. M. Clark	62.00
14	" 31, "	Geo. D. Cook	62.00
15	" 31, "	F. W. McCulley	62.00
16	" 31, "	A. J. Whitney	62.00
17	" 31, "	H. A. Moore	279.00
18	" 31, "	D. H. Sullivan	54.25
19	" 31, "	S. F. Cady	54.25
20	" 31, "	H. M. Benson	248.00
22—A	Sept. 8, "	A. Fetters	7.85
22—B	" 30, "	J. D. King	100.00

## NATIONAL BANK OF COMMERCE.

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23	Sept. 30, 1908	F. M. Clark	\$60.00
23	" 30, "	F. M. Clark	60.00
24	" 30, "	Geo. D. Cook	60.00
25	" 30, "	F. W. McCulley	60.00
26	" 30, "	A. J. Whitney	60.00
27	" 30, "	H. A. Moore	270.00
28	" 30, "	D. H. Sullivan	52.50
29	" 30, "	S. F. Cady	52.50
30	" 30, "	H. M. Benson	240.00
1	Oct. 31, "	J. D. King	100.00
2	" 31, "	F. M. Clark	62.00
3	" 31, "	H. A. Moore	279.00
4	" 31, "	Geo. D. Cook	62.00
5	" 31, "	F. W. McCulley	62.00
6	" 31, "	A. J. Whitney	62.00
7	" 31, "	H. M. Benson	248.00
8	" 31, "	(Blank)	54.25
9	" 31, "	S. F. Cady	54.25
11	Nov. 30, "	J. D. King	100.00
12	" 30, "	F. M. Clark	60.00
13	" 30, "	Geo. D. Cook	60.00
14	" 30, "	F. W. McCulley	60.00
15	" 30, "	A. J. Whitney	60.00
16	" 30, "	H. A. Moore	270.00
17	" 30, "	D. H. Sullivan	52.50
18	" 30, "	S. F. Cady	52.50
19	" 30, "	H. M. Benson	240.00
21	Dec. 31, "	J. D. King	100.00
22	" 31, "	F. M. Clark	62.00
23	" 31, "	Geo. D. Cook	62.00
24	" 31, "	F. W. McCulley	62.00
25	" 31, "	A. J. Whitney	62.00
26	" 31, "	D. H. Sullivan	54.25
27	" 31, "	S. F. Cady	54.25
28	" 31, "	T. E. Lynch	24.50
29	" 31, "	Claude J. Perret	24.50

No.	Date.	Payee.	Amount.
30	Dec. 31, 1908	H. M. Benson	\$276.00
31	" 31, "	H. A. Moore	279.00
1	Jan. 5, 1909	J. D. King	12.90
2	" 5, "	F. M. Clark	8.00
3	" 8 "	Geo. D. Cook	16.00
4	" 8, "	F. W. McCulley	16.00
5	" 8, "	A. J. Whitney	16.00
6	" 8, "	D. H. Sullivan	14.00
7	" 8, "	S. F. Cady	14.00
8	" 8, "	H. M. Benson	48.00
9	" 8, "	H. A. Moore	72.00
14	Mar. 31, 1909	J. D. King	35.48
15	" 31, "	F. M. Clark	22.00
16	" 31, "	Geo. D. Cook	18.00
17	" 31, "	F. W. McCulley	18.00
18	" 31, "	A. J. Whitney	18.00
19	" 31, "	Joe Mikel	14.00
20	" 31, "	E. M. Bassett	14.00
21	" 31, "	Geo. K. Cooper	14.00
22	" 31, "	Chas. Paine	14.00
23	" 31, "	H. M. Benson	82.50
24	" 31, "	A. C. Junkin	72.00
1	Apr. 30, "	J. D. King	100.00
2	" 30, "	F. M. Clark	60.00
3	" 30, "	Geo. D. Cook	60.00
4	" 30, "	F. W. McCulley	60.00
5	" 30, "	A. J. Whitney	60.00
6	" 30, "	Joe Mikel	52.50
7	" 30, "	E. M. Bassett	52.50
8	" 30, "	Geo. K. Cooper	52.50
9	" 30, "	Chas. Paine	52.50
10	" 30, "	A. C. Junkin	270.00
11	" 30, "	H. M. Benson	300.00
13	May 31, "	J. D. King	100.00
14	" 31, "	F. M. Clark	62.00

No.	Date.	Payee.	Amount.
15	May 31, 1909	Geo. D. Cook	\$62.00
16	" 31, "	F. W. McCulley	62.00
17	" 31, "	A. J. Whitney	62.00
18	" 31, "	Joe Mikel	54.25
19	" 31, "	E. M. Bassett	54.25
20	" 31, "	Geo. K. Cooper	54.25
21	" 31, "	Chas. Paine	54.25
22	" 31, "	A. C. Junkin	279.00
23	" 31, "	H. M. Benson	310.00
25	June 30, "	J. D. King	100.00
26	" 30, "	F. M. Clark	60.00
27	" 30, "	Geo. D. Cook	60.00
28	" 30, "	F. W. McCulley	60.00
29	" 30, "	A. J. Whitney	60.00
30	" 30, "	Joe Mikel	52.50
31	" 30, "	E. M. Bassett	52.50
32	" 30, "	Geo. K. Cooper	52.50
33	" 30, "	Chas. Paine	52.50
34	" 30, "	H. M. Benson	300.00
35	" 30, "	A. C. Junkin	270.00
1	July 31, "	J. D. King	100.00
2	" 31, "	F. M. Clark	62.00
3	" 31, "	Geo. D. Cook	62.00
4	" 31, "	F. W. McCulley	62.00
5	" 31, "	A. J. Whitney	62.00
6	" 31, "	Joe Mikel	54.25
7	" 31, "	E. M. Bassett	54.25
8	" 31, "	Geo. K. Cooper	54.25
9	" 31, "	Chas. Paine	54.25
10	" 31, "	A. C. Junkin	279.00
11	" 31, "	H. M. Benson	310.00
13	Aug. 31, "	J. D. King	100.00
14	" 31, "	F. M. Clark	62.00
15	" 31, "	Geo. D. Cook	62.00
16	" 31, "	F. W. McCulley	62.00

No.	Date.	Payee.	Amount.
17	Aug. 31, 1909	A. J. Whitney	\$62.00
18	" 31, "	Joe Mikel	54.25
19	" 31, "	E. M. Bassett	54.25
20	" 31, "	Geo. K. Cooper	54.25
21	" 31, "	Chas. Paine	54.25
22	" 31, "	A. C. Junkin	279.00
23	" 31, "	H. M. Benson	310

Indorsed: Complaint. Filed U. S. Circuit Court, Western District of Washington. Dec. 22, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*United States Circuit Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA                          }  
    Plaintiff,  
    }  
vs.    } No. 1933.  
NATIONAL BANK OF COMMERCE,                        }  
a Corporation,    }  
    Defendant.    }

### ANSWER.

Comes now the defendant in the above-entitled action and answering the complaint of the plaintiff, for cause of answer says:

#### I.

Defendant admits the allegations contained in paragraph one of the complaint.

#### II.

Answering the second paragraph of the complaint, this defendant admits that during the years 1907, 1908 and 1909

one P. M. McCoy was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said period plaintiff deposited with the defendant large sums of money to the credit of said P. M. McCoy, and denies each and every other allegation in said paragraph contained and each and every part thereof.

### III.

Answering the third paragraph of the complaint this defendant admits that said deposits were made with this defendant, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

### IV.

Answering the fourth paragraph of the complaint this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

### V.

Answering the fifth paragraph of the complaint this defendant admits that it paid certain checks drawn by the said McCoy against said deposits of the plaintiff and charged the respective amounts thereof against the deposits of the plaintiff, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

### VI.

Answering the sixth paragraph of the complaint this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

### VII.

Answering the seventh paragraph of the complaint this defendant says that it has neither knowledge nor information

sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

### VIII.

Answering the eighth paragraph of the complaint this defendant admits that on the 5th of March, 1910, the plaintiff demanded of and from the defendant payment of Fifteen Thousand One Hundred Twenty-nine and 81/100 Dollars (\$15,129.81), and denies each and every other allegation in said paragraph contained and each and every part thereof.

### IX.

Answering the ninth paragraph of the complaint this defendant admits that it refused and still refuses to make the payment of said amount or any part thereof.

### X.

Answering the tenth paragraph of the complaint this defendant denies the same and each and every part thereof, and denies that there is now due and owing to the plaintiff from the defendant on said account the sum of \$15,129.81, or any other sum or sums whatsoever.

For a further and first affirmative defense to said complaint this defendant alleges:

#### I.

That during the years 1907, 1908 and 1909 the plaintiff deposited with the defendant various and considerable sums of money to the credit of one M. P. McCoy, as Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States, with instructions to pay checks drawn against said deposits by the said M. P. McCoy as such Examiner and Special Disbursing Agent; that at the end of each month the account so created in favor of the said McCoy was regularly balanced by the defendant and the vouchers returned to the plaintiff and a statement of account was rendered both to the said McCoy and to said plaintiff

monthly during the entire time that the plaintiff carried said account in favor of the said McCoy with this defendant. That the plaintiff did not, within sixty days after the return to the plaintiff of the checks drawn by the said McCoy against said account, notify the defendant that the checks so paid were forgeries. That by reason of such failure to so notify the defendant of said forgeries within sixty days after the return of the paid checks, the plaintiff is barred and estopped from maintaining this action.

For a further and second affirmative defense to plaintiff's complaint this defendant alleges:

#### I.

That the deposits so made by the plaintiff with this defendant in favor of the said M. P. McCoy, as such Examiner and Special Disbursing Agent, were made in the usual and customary manner, as deposits are generally, ordinarily and customarily made by any individual depositor and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay checks drawn by the said McCoy against such deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks, and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said M. P. McCoy, as such Examiner and Special Disbursing Agent, and that monthly statements were rendered to the plaintiff and to the said McCoy, showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any

checks by reason of forgeries or otherwise, until the 5th day of March, 1910. That it was the duty of the plaintiff upon the return of the vouchers of the said McCoy and upon the rendition of statements of his account, to have examined the said account and to have promptly notified the defendant of the alleged forgeries, if any there were, and that by reason of plaintiff's failure to so notify the defendant of such forgeries within a reasonable time after the said checks were paid, the said plaintiff is barred and estopped of any right it may have had to maintain this action for the recovery of the money prayed for in the complaint.

WHEREFORE defendant prays that it may be dismissed hence with its costs and disbursements in this action expended.

KERR & McCORD,  
Attorneys for Defendant.

State of Washington,  
County of King—ss.

Ralph S. Stacey, being first duly sworn, upon oath deposes and says that he is Second Vice President of the National Bank of Commerce of Seattle, the defendant in the above entitled action; that he has read the within and foregoing answer, knows the contents thereof, and that the same is true, as he verily believes.

RALPH S. STACEY.

Subscribed and sworn to before me this, the 11th day of February, A. D., 1911.

(Seal) J. N. IVEY,  
*Notary Public in and for the State of Washington, Residing  
at Seattle.*

Copy of within answer received and due service of same acknowledged this 11th day of February, 1911.

ELMER E. TODD,  
W. G. McLAREN,  
Attorneys for Plaintiff.

Indorsed: Answer. Filed U. S. Circuit Court, Western District of Washington, Feb. 11, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*United States Circuit Court Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff.*,  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
*Defendant.*,  
} No. 1933.

### DEMURRER.

#### I.

Comes now the above named plaintiff and demurs to the first affirmative defense of the defendant herein, for the reason and upon the grounds that said affirmative defense does not state facts sufficient to constitute a defense to said action.

#### II.

And plaintiff demurs to defendant's second affirmative defense for the reason and upon the grounds that said defense does not state facts sufficient to constitute any defense to said action.

ELMER E. TODD,  
United States Attorney.

W. G. McLAREN,  
Assistant United States Attorney.

Received a copy of the within demurrer this 23d day of Feb., 1911. Kerr & McCord. Attorneys for Defendant.

Indorsed: Demurrer. Filed U. S. Circuit Court, Western District of Washington, Feb. 23, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*United States Circuit Court Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA } 1933.  
vs. } Filed Sept. 21, 1911.  
NATIONAL BANK OF COMMERCE. }

ORAL DECISION ON DEMURRER TO AFFIRMATIVE DEFENSES.

The United States prosecutes this action to recover a sum of money, being the aggregate amount of numerous checks issued by a disbursing agent against a deposit account subject to his checks in the defendant bank, which is an authorized depository of government money. A series of frauds was practiced by issuing checks payable to the order of fictitious payees, these were endorsed by the disbursing agent using the fictitious names, other banks then received and cashed them and passed them on to the defendant, and by that method the disbursing agent obtained and misappropriated the money.

The defendant pleads as a defense that during the period of time in which the checks were issued and paid, it regularly rendered monthly statements of account to the government and with each statement returned the checks which had been paid during the preceding month, and that by failing to report the bad checks with business promptness, the action is barred by laches. The answer contains two separate affirmative defenses but they are alike, except that, the first one alleges that the government failed to report the bad checks within a period of sixty days. The demurrer is aimed at both of these defenses.

If these checks came to the defendant bank through other banks the defendant became obligated, by business rules and bank rules, to promptly report any ground for rejecting the checks, or for reclaiming the amounts paid thereon. I doubt very much whether it would have recourse at this time against the banks from whom the checks were received, even if the

government should prevail in the action. The right to reclaim is probably barred by the lapse of time. There may be good ground for holding that the statutes that have been cited are not applicable or controlling, but without any statute the rule of honest, fair dealing between contracting parties applicable to this case, is that bankers must bear losses resulting from paying bad checks. When a check is presented for payment, the banker has a right to know, to be assured, before paying, that the person demanding payment is the identical person entitled to receive the money. If a check is written payable to a person, or supposed person, or to his order, the bank is not obligated to pay that check until the holder identifies himself as the payee, or endorsee and offers satisfactory proof of the genuineness of every endorsement thereon. That is a natural right incidental to a banker's liability for making a payment to a person having no right to demand it. Now, tracing that same rule a little further, where the bank has been deceived and has paid a check which ought not to have been paid, early information of the error is necessary to preserve the right of recourse against whomsoever may be primarily responsible for the error and the depositor is the one best qualified to discover errors, so that there is a presumption that he will, upon inspection of checks that have been paid, discover a bad check if there is one, and he is obligated to be vigilant and prompt to report errors. Therefore, where there is a running account between a depositor and a bank, and monthly statements are made to the depositor, with a surrender of his checks that the bank has paid, according to the rule of honesty and fair dealing, the depositor becomes bound to look at the returns and report any error promptly. The rule between individuals having mutual running accounts is that, an account stated becomes an account proved, if the party to whom the statement is rendered fails to show errors or mistakes in it within a reasonable time. There is a good reason for this, which this case demonstrates, for if the plaintiff had acted with promptness in checking up the returns made by the defendant

as pleaded in its answer, the fraudulent practice would have been discovered and stopped and all parties could have been protected. The failure of the government to examine these returns and report errors in time, was a cause of the successful practice, or continuance of those frauds, and was necessarily detrimental to the defendant. That failure on the part of the government counterbalances any neglect to discharge its obligation on the part of the defendant bank. There has been a loss suffered by reason of mutual neglect by plaintiff and defendant. Now, who should bear that loss? I think that the common law rule, that where there is negligence and contributory negligence the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. In this case that rule leaves the loss resting upon the plaintiff. The Court sustains the demurrer to the first affirmative defense and overrules it as to the second.

C. H. HANFORD  
United States District Judge.

Indorsed: Oral Decision on Demurred to Affirmative Defenses. Filed U. S. Circuit Court, Western District of Washington, Sept. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*In the Circuit Court of the United States for the Western  
District of Washington. Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
*Defendant.* } No. 1933.

ORDER.

The above entitled cause having come on for hearing in open court on the 18th day of September, 1911, on the demurrer of the plaintiff to each of the two separate affirmative defenses of the defendant herein, plaintiff appearing by Elmer E. Todd, United States Attorney, and W. G. McLaren, Assistant United States Attorney, and defendant appearing by Kerr and McCord, its attorneys, and the Court having heard the argument of counsel thereon, and being in all things fully advised;

It is hereby ordered that the demurrer of the plaintiff to the first affirmative defense of the defendant, be, and the same is hereby sustained;

To which action of the Court the defendant then and there excepted, which exception is hereby allowed.

It is further ordered that the demurrer of the plaintiff to the second affirmative defense of the defendant be, and the same is hereby overruled;

To which action of the Court the plaintiff then and there excepted, which exception is hereby allowed.

Done in open court this 21st day of September, 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court Western District of Washington, Sept. 21, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*In the District Court of the United States for the Western  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,  
vs.  
NATIONAL BANK OF COMMERCE  
OF SEATTLE, a Corporation,

Plaintiff,  
*Defendant.*

No. 1933.

#### AMENDED ANSWER.

Comes now the defendant in the above entitled action and filing its amended answer to the complaint of the plaintiff, for cause of answer, says:

##### I.

Defendant admits the allegations contained in paragraph one of the complaint.

##### II.

Answering the second paragraph of the complaint, this defendant admits that during the years 1907, 1908 and 1909, one P. M. McCoy was an Examiner of Surveys and Special Disbursing Agent for the Interior Department of the United States; that during said period plaintiff deposited with the defendant large sums of money to the credit of said P. M. McCoy, and denies each and every other allegation in said paragraph contained and each and every part thereof.

##### III.

Answering the third paragraph of the complaint, this defendant admits that said deposits were made with this defendant, but denies each and every other allegation in said paragraph contained and each and every part thereof.

##### IV.

Answering the fourth paragraph of the complaint, this defendant says that it has neither knowledge nor information

sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

#### V.

Answering the fifth paragraph of the complaint this defendant admits that it paid certain checks drawn by the said McCoy against said deposits of the plaintiff and charged the respective amounts thereof against the deposits of the plaintiff, but denies each and every other allegation in said paragraph contained, and each and every part thereof.

#### VI.

Answering the sixth paragraph of the complaint, this defendant says it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

#### VII.

Answering the seventh paragraph of the complaint, this defendant says that it has neither knowledge nor information sufficient to enable it to form a belief as to the truth or falsity of the matters and things therein alleged, and therefore denies the same and each and every part thereof.

#### VIII.

Answering the eighth paragraph of the complaint, this defendant admits that on the 5th of March, 1910, the plaintiff demanded of and from the defendant payment of Fifteen Thousand One Hundred Twenty-nine and 81/100 Dollars (\$15,129.81), and denies each and every other allegation in said paragraph contained and each and every part thereof.

#### IX.

Answering the ninth paragraph of the complaint, this defendant admits that it refused and still refuses to make the payment of said amount or any part thereof.

## X.

Answering the tenth paragraph of the complaint, this defendant denies the same and each and every part thereof, and denies that there is now due and owing to the plaintiff from the defendant the sum of \$15,129.81, or any other sum or sums whatsoever.

And for a further and first affirmative defense to the complaint, this defendant alleges:

1. That the deposits so made by the plaintiff with the defendant in favor of P. M. McCoy as such Examiner of Surveys and Special Disbursing Agent, were made in the usual and customary manner, as deposits are usually, ordinarily and customarily made by any individual depositor and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay the checks drawn by the said McCoy against said deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said McCoy, as Special Examiner and Disbursing Agent, and that monthly statements were rendered to the plaintiff and to the said McCoy showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any checks by reason of forgeries, fictitious payees, or otherwise, until the 5th day of March, 1910. That it was the duty of plaintiff upon the return of the vouchers of said McCoy and upon the rendition of statements of his account, to have examined said account and to

have promptly notified the defendant of the alleged forgeries or fraud, if any there were. That the failure on the part of the plaintiff to promptly notify the defendant of the alleged forgeries or fraud, if any there were, resulted in damage and injury to the defendant in a sum in excess of the amount sued for by the plaintiff in this action, and that the defendant was damaged by such negligence on the part of the plaintiff in failing to notify the defendant of the alleged forgeries promptly, in that the defendant would have been able—if the forgeries had promptly been made known to the defendant—to have prevented any of the forgeries except the first one, or the ones that occurred during the first month of the period during which said forgeries are alleged to have been committed; and that by reason of the failure of the plaintiff to so promptly notify the defendant of the fraud of the said McCoy, the defendant is precluded from asserting any claim that it may have had against the various banks which forwarded the checks in question to the defendant for payment, and that by reason of plaintiff's failure to so notify the defendant of such fraud on the part of said McCoy within a reasonable time after said checks were paid and a statement of the account of the said McCoy, together with the vouchers, was sent by the defendant to the plaintiff, the said plaintiff is barred and estopped of any right it may have had, if any, to maintain this action for the recovery of the money prayed for in the complaint.

For a further and second affirmative defense to the complaint, this defendant alleges:

1. That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States created by said McCoy under authority of the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy, as Special Examiner of Surveys, was authorized to make and pay on behalf of the United States.

WHEREFORE defendant prays that it may be dismissed hence with its costs and disbursements in this action expended.

KERR & McCORD.  
Attorneys for Defendant.

Indorsed: Amended Answer. Filed in the U. S. District Court, Western District of Washington. Mar. 12, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,                          }  
    Plaintiff,  
vs.    }  
NATIONAL BANK OF COMMERCE, a                      No. 1933-C  
corporation,    }  
    Defendant.

### REPLY TO AMENDED ANSWER

Comes now the plaintiff and for its reply to the first affirmative defense in defendant's amended answer herein, denies each and every allegation therein contained.

### II.

Replying to the second affirmative defense, plaintiff denies that the money sued for in this action, or any part thereof, was expended and used in payment of claims against the United States or at all.

ELMER E. TODD,  
United States Attorney.  
W. G. McLAREN,  
Assistant United States Attorney.

Received a copy of the within Reply this 12th day of March, 1912.

KERR & McCORD,  
Attorneys for Defendant.

Indorsed: Reply to Amended Answer. Filed U. S. District Court, Western District of Washington, Mar. 13, 1912. A. W. Engle, Clerk, By S. Deputy.

*In the District Court of the United States for the Western District of Washington, Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
*Defendant.* } No. 1933

TRIAL

And now the hour of ten o'clock A. M. having arrived, the plaintiff being represented by W. G. McLaren, and the defendant represented by E. S. McCord, the jury being called all answer to their names, all being present in their box, this cause proceeds by the plaintiff resting its cause and the defendant moves for a non-suit, and the Court having duly considered the motion and being sufficiently advised grants said motion.

And now at this time upon motion of the plaintiff the case is reopened and the cause proceeds by the introduction of documentary evidence and examination of witness on behalf of the plaintiff until the close thereof.

Whereupon the jury is discharged from further consideration of the cause.

*In the District Court of the United States for the Western  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
*Defendant.*

No. 1933

### PETITION FOR NEW TRIAL

Comes now the plaintiff herein by Elmer E. Todd, United States Attorney, and by W. G. McLaren, Assistant United States Attorney, and moves the Court to grant a new trial in the above entitled cause, upon the following grounds, to-wit:

That error in law occurred at the trial of said cause, then and there duly excepted to by plaintiff herein, which error consisted in granting a motion of non-suit against the plaintiff at the close of plaintiff's case.

This petition is based upon the records and filed herein.

ELMER E. TODD,  
United States Attorney.  
W. G. MCLAREN,  
Assistant United States Attorney.

Received a copy of the within Petition this 20th day of March, 1912.

KERR & McCORD,  
Attorney for Defendant.

Indorsed: Petition for new Trial. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 22, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
*Defendant.*

} No.1933-C

**ORDER DENYING MOTION FOR NEW TRIAL.**

This matter having heretofore come on regularly for hearing on the 17th day of June, 1912, before C. H. Hanford, Judge of the above entitled court, upon plaintiff's motion for a new trial, plaintiff appearing by W. G. McLaren, United States Attorney, and the defendant appearing by Kerr & McCord, its attorneys, and the court having heard the arguments of counsel therein, and being in all things fully advised;

**IT IS HEREBY ORDERED**, That said motion of plaintiff for a new trial herein, be, and the same is hereby denied;

To which ruling of the court the plaintiff then and there fully excepted, and the exception is hereby allowed.

C. H. HANFORD, Judge.

Order Denying Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, June 27, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,  
vs.  
*Plaintiff,*  
NATIONAL BANK OF COMMERCE,  
*Defendant.*

No. 1933-C

JUDGMENT OF NON-SUIT.

This matter having heretofore come on regularly for trial before the above entitled court and a jury, plaintiff appearing by Elmer E. Todd, United States Attorney, and by W. G. McLaren, Assistant United States Attorney, and the defendant appearing by Kerr & McCord, its attorneys, and the court having heard the evidence submitted in behalf of the plaintiff, thereupon the defendant made a motion for the dismissal of said cause, on account of the insufficiency of the plaintiff's evidence, and the court having heard the arguments of counsel thereon, thereupon granted said motion, and thereafter on the 17th day of June, 1912, a motion for a new trial by the plaintiff coming on regularly for hearing and having been denied by the court, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That plaintiff take nothing by its said action, and that the said action be and the same is hereby dismissed;

To which judgment of the court the plaintiff excepts, and the exception is hereby allowed.

C. H. HANFORD, Judge.

Indorsed: Judgment of Non Suit. Filed in the U. S. District Court, Western Dist. of Washington, June 27, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
*Defendant.*

No. 1933-C

STIPULATION.

It is hereby stipulated by and between the parties hereto, by their respective attorneys of record herein, that the plaintiff may have thirty days from the 18th day of June, 1912, in which to prepare and settle its bill of exceptions herein.

W. G. McLAREN,  
Attorney for plaintiff.  
KERR & McCORD,  
Attorneys for defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. June 27, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,  
vs.  
NATIONAL BANK OF COMMERCE,

*Plaintiff,*  
*Defendant.*

No. 1933-C

**ORDER EXTENDING TIME FOR FILING BILL OF  
EXCEPTIONS.**

Upon motion of the United States Attorney, and pursuant to the written stipulation of the parties hereto now on file herein, providing for the extension of time to the plaintiff for signing, allowing and filing of bill of exceptions herein, the court having considered the same and cause being shown therefor;

IT IS HEREBY ORDERED, That the time for the preparation, signing, allowance and filing of bill of exceptions of the above named plaintiff in the above entitled cause, is hereby extended for a period of thirty days from and after June 18th, 1912.

Dated this 27th day of June, 1912.

C. H. HANFORD, Judge.

Indorsed: Order Extending Time for Filing of Exceptions.  
Filed in the U. S. District Court, Western Dist. of Washington,  
June 27, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA, }  
                                *Plaintiff,* }  
                                vs.    } No. 1933-C  
THE NATIONAL BANK OF COM- }  
MERCE,    *Defendant.* }

STIPULATION.

It is hereby stipulated by and between the parties hereto by their respective attorneys of record herein, that the plaintiff may have up to and including August 26, 1912, in which to prepare, file and serve its bill of exceptions herein.

Dated this 15th day of July, 1912.

W. G. McLAREN,  
Attorney for Plaintiff,  
KERR & McCORD,  
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, July 17, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,  
vs.  
THE NATIONAL BANK OF COM-  
MERCE.  
*Plaintiff,*  
*Defendant.*

No. 1933-C

ORDER.

On motion of the United States Attorney, and pursuant to a written stipulation of the parties hereto now on file herein, providing for the extension of time of the plaintiff for preparing, filing and serving its bill of exceptions herein, the court having considered the same and good cause being shown therefor;

**IT IS HEREBY ORDERED AND CONSIDERED**, That the time within which the plaintiff may prepare, file and serve its bill of exceptions herein, be, and it is hereby extended and enlarged to and including the 26th day of August, 1912.

Dated this 17th day of July, 1912.

C. H. HANFORD, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, July 17, 1912. A. W. Engle, Clerk.  
By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,  
vs.  
THE NATIONAL BANK OF COM-  
MERCE, a corporation,

*Plaintiff,*  
*Defendant.*

No. 1933-C

ORDER.

Upon motion of the United States Attorney, and the above named defendant, by its attorneys, Kerr & McCord, consenting thereto, good cause therefor being shown;

IT IS HEREBY ORDERED AND CONSIDERED, That the time within which plaintiff may prepare, file and have certified its bill of exceptions herein be and it is hereby extended and enlarged to and including the 31st day of August, 1912.

Done in open court this 24th day of August, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order. Filed in the U. S. Dist. Court, Western Dist. of Washington. Aug. 24, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,                                  }  
    Plaintiff,  
vs.    }  
    No. 1933-C  
NATIONAL BANK OF COMMERCE,                              }  
    Defendant.

**STIPULATION.**

It is hereby stipulated by and between the above named parties, through their respective undersigned attorneys of record herein, that an order may be entered authorizing and directing the Clerk of the above entitled court to stamp and file plaintiff's exhibit "G" herein, as of date March 12, 1912, when the same was offered in evidence in the trial of the above entitled cause, in order that a correction may be made of the inadvertent omission to properly stamp, mark and file said exhibit at the time the same was so offered and received in evidence.

Dated this 29th day of July, 1912.

W. G. McLAREN,  
United States Attorney.  
KERR & McCORD,  
Attorneys for defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, July 30, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA, }  
                                *Plaintiff,* }  
vs.                            } No. 1933-C  
NATIONAL BANK OF COMMERCE, }  
                                *Defendant.* }

ORDER AUTHORIZING CLERK TO MAKE A NUNC  
PRO TUNC FILE, STAMP AND MARKING OF  
PLAINTIFF'S EXHIBIT "G."

It appearing to the court that in the trial of the above entitled cause in the above entitled court on March 12, 1912, plaintiff's exhibit "G" was offered in evidence by the plaintiff and admitted in evidence by the trial court, and that by an inadvertent oversight said exhibit was not stamped, marked or filed by the Clerk of the court so as to show that the same was so received and admitted in evidence; now, therefore, on motion of the United States Attorney and upon the Stipulation of the parties now on file herein;

IT IS HEREBY ORDERED, That the Clerk of the above named court be, and he is hereby authorized, directed and ordered to mark said exhibit "G" as having been admitted and filed in evidence in the above entitled cause on said March 12, 1912, in order that the record of said exhibit being admitted in evidence may be correct.

Done in open Court this 30th day of July, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, July 30, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,                          }  
                                    Plaintiff,                  }  
vs.    }  
NATIONAL BANK OF COMMERCE,                          }  
a corporation,    }  
                                    Defendant.                          }  
    No. 1933.

MOTION.

Comes now the United States by W. G. McLaren, United States Attorney, and moves the court to enter an order herein certifying the accompanying exhibits as plaintiff's exhibits "B," "C," "D," "E" and "F," offered in evidence on the trial of this cause, and rejected by the court; and certifying and authorizing and directing the Clerk of this court to transmit to the Circuit Court of Appeals for the Ninth Circuit, said rejected exhibits, and plaintiff's exhibits "A" and "G," as a part of the bill of exceptions herein, when the same shall be filed.

This motion is based upon the records and files herein, and upon the accompanying stipulation.

W. G. McLAREN,  
United States Attorney.

Indorsed: Motion. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 22, 1912. A. W. Engle, Clerk.  
By S. Deputy.

*United States District Court, Western District of Washington,  
Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
a corporation,  
*Defendant.* } No. 1933

STIPULATION.

It is hereby stipulated and agreed by and between the above named parties, through their respective undersigned attorneys of record herein, that an order may be entered herein certifying as a part of the bill of exceptions herein and directing the Clerk of the above named court to transmit to the Circuit Court of Appeals for the Ninth Circuit, plaintiff's original exhibits "A" and "G" herein, and certifying as a part of the bill of exceptions herein and directing the Clerk to transmit to said Circuit Court of Appeals for the Ninth Circuit, plaintiff's exhibits "B," "C," "D," "E," and "F," as exhibits offered in evidence by plaintiff in the trial of said cause, and rejected by the court.

This stipulation is executed for the purpose of the hearing of this cause in said Circuit Court of Appeals on a writ of error, and for the reason that the alleged forgery of papers in said exhibit "A" is at issue in this cause, and all of said exhibits are claimed by the plaintiff to be in the handwriting of one McCoy and are difficult of reproduction.

Dated at Seattle, Washington, this 1st day of Aug., 1912.

W. G. McLAREN,  
U. S. Atty.  
KERR & McCORD,  
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 22, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western Wistrict of Washington.  
Northern Division.*

UNITED STATES OF AMERICA,  
                        *Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
                        *Defendant,* }  
                        }

No. 1933.

ORDER.

Upon the motion of the United States Attorney, it appearing to the court that plaintiff's exhibits "A" and "G" received in evidence on the trial of this cause, and plaintiff's exhibits "B", "C", "D", "E" and "F", offered in evidence and rejected by the court, are claimed by the plaintiff to be in the handwriting of one McCoy, and that the alleged forgery by said McCoy of the papers comprising plaintiff's exhibit "A" is in issue herein and that an inspection of said exhibits and rejected exhibits will be aidful to the Appellate Court in the determination of this cause on writ of error, and the parties consenting thereto;

IT IS HEREBY ORDERED, that the papers marked plaintiff's exhibits "B", "C", "D", "E" and "F", be placed in the custody of the Clerk of this court for safe keeping, and designated as the exhibits offered in evidence by plaintiff on the trial of this cause and rejected by this court;

IT IS FURTHER ORDERED, That upon the settlement and certification of the bill of exceptions herein, said rejected exhibits "B", "C", "D", "E" and "F", and the exhibits marked

plaintiff's exhibits "A" and "G", be certified as a part of said bill of exceptions, and that all the originals be transmitted to the Circuit Court of Appeals with the printed record herein as part of said bill of exceptions.

Done in open court this 22d day of August, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western District of Washington, Aug. 22, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA  
Plaintiff,  
vs.  
NATIONAL BANK OF COMMERCE,  
Defendant. } }

No. 1933—C.

PLAINTIFF'S PROPOSED CERTIFICATE TO BILL OF  
EXCEPTIONS.

I, Edward E. Cushman, United States District Judge for the Western District of Washington, holding court in the Northern Division of said district, in which the above entitled cause was tried, do hereby certify that the above entitled cause was tried before Cornelius H. Hanford, then United States District Judge for said Western District of Washington, who has since duly and regularly resigned his said position as such judge, which said resignation has heretofore been duly and regularly accepted, and do hereby certify and authenticate the following matters and the deposition and exhibits herein referred to or hereto attached as all the evidence, exhibits and

other material facts, matters and proceedings in said cause, not already a part of the record therein, and now constitute the same a bill of exceptions herein.

EDWARD E. CUSHMAN,  
United States District Judge.

*In the United States District Court for the Western District  
of Washington, Northern Division.*

UNITED STATES OF AMERICA,                                  }  
    Plaintiff,  
vs.    }  
NATIONAL BANK OF COMMERCE,                              No. 1933—C.  
a Corporation,    }  
    Defendant.

BE IT REMEMBERED that heretofore and on to-wit, March 12, 1912, the above entitled cause came regularly on for trial in the above court, and before the Honorable C. H. Hanford, District Judge, sitting with a jury,

The plaintiff appearing by W. G. McLaren, Esq., Assistant United States Attorney;

The defendant appearing by E. S. McCord, Esq., of Messrs. Kerr & McCord, its attorneys and counsel;

A jury having been duly empaneled and sworn to try the cause, and counsel for plaintiff having made his opening statement to the jury, counsel for defendant reserving his opening statement, thereupon the following proceedings were had and done, to-wit:

MR. McLAREN: Will the Clerk hand me the deposition and the checks and the exhibits?

MR. McCORD: Do you want me to help you read it, Mr. McLaren, the questions?

MR. McLAREN: Yes, if you will, Mr. McCord. You will find my copy on the desk there, if you want to.

Gentlemen, this is the testimony I am reading to you. We took the deposition of this Mr. McCoy, whom I have just told you about, over in Spokane a few weeks ago, before the United States Commissioner at Spokane. I am reading to you now the answers which he gave in response to the questions which I put to him at that time, and there is also in this deposition the examination that Mr. McCord made of him in behalf of the defendant bank. If you will read the questions, Mr. Cord, I will be obliged to you.

Counsel thereupon read the deposition of M. P. McCoy, a witness on behalf of the plaintiff, taken before Denton M. Crow, a United States Commissioner in and for the Eastern District of Washington, at his office in Spokane, Washington, beginning on February 19, 1912, which reading and the proceedings had in connection therewith were as follows:

M. P. McCOY, a witness on behalf of the plaintiff, being first duly sworn, on oath deposes and says as follows:

## DIRECT EXAMINATION

BY MR. McLAREN:

Q Your name is M. P. McCoy, is it?

A Yes sir.

Q You were formerly in the government service?

A Yes sir, as examiner of surveys for the General Land Office.

Q What was your official title?

A Examiner of Surveys and Special Purchasing Agent.

MR. McLAREN: "Disbursing Agent" that should be, Mr. McCord.

Q Where were your headquarters?

A Seattle.

Q During what period of time did you occupy that position?

A From about 1900 until about two years ago.

Q About November, 1909?

A Yes sir.

Q You held that position continuously during that time?

A Yes sir.

Q What other important position, if any, did you hold prior to that period?

A I was a member of the Geological Survey for the Interior Department.

Q For about how long?

A For about ten years before that.

Q What were your duties as examiner of surveys and special disbursing agent, what was the nature of your work?

A The public lands are surveyed by contract, by deputy surveyors, and by business was to inspect their surveys in the field after their finishing their work—checking it up, in other words, to see if it was correct.

Q About how wide a territory did your duties cover?

A Well, I was in the States of Washington, Oregon, Idaho and Montana.

Q And you say that your headquarters were at Seattle?

A Yes sir.

Q What was it necessary for you to do, Mr. McCoy, in order to go around examining these public—these surveys of public lands, what did you have to do?

A To inspect the surveys in the field, which necessitated transportation and assistants and subsistence for the assistants.

Q You were authorized by the Government to employ men for that purpose?

A And to incur all these expenses.

Q Were some of these surveys made in the State of Washington?

A Yes sir.

Q Where, for instance?

A Well throughout the state.

Q You got your instructions from Washington, D. C.?

A Yes sir.

Q Were these instructions given to you for each particular survey, or were they in the nature of general instructions which you were to follow out?

A There were general instructions and sometimes special instructions.

Q Under the general instructions, did you have your own option as to the order in which you took up the examination of the different surveys?

A Yes sir.

Q What arrangement was made relative to the payment of the bills that you might incur under your authority for the performance of your duties?

BY MR. McCORD: Q Were these instructions in writing?

A Yes sir.

BY MR. McLAREN:

Q What became of these instructions, Mr. McCoy?

A I burned them something like two years ago, when this trouble began, I burned all my field notes and note books and all things of that kind. I had a trunk full and I burned them.

Q Can you give us, briefly, the arrangements you had with the Government, whereby this money was to be paid for labor, or for services, or material, which you might incur?

MR. McCORD: I object as that is not the best evidence and no proper foundation has been laid for the introduction of secondary evidence.

MR. McCORD: I object to that.

THE COURT: I overrule the objection.

Q I will ask you this question, Mr. McCoy—From where did you get your instructions regarding the payment of this money?

A From the Commissioner of the general land office.

Q Were they oral, or in writing?

A Written.

Q These written instructions, you still have them?

A No sir.

Q What became of them?

A I burned them.

Q I will ask you what your instructions were, as to how you were to pay these men?

MR. McCORD: I object, as it is not the best evidence; asking for the contents of a written instrument; there is not shown any reason why the originals cannot be produced. The best evidence would be the files in the Land Office at Washington, or a copy of them.

MR. McCORD: I make that objection, Your Honor.

MR. McLAREN: The testimony shows the originals were burned, Your Honor. I think any secondary evidence is competent.

(Discussion.)

THE COURT: The next best evidence to the originals would be an examined or approved copy. I will sustain this objection.

MR. McLAREN: Allow us an exception.

THE COURT: Exception allowed.

Q How were you to pay them?

A I was to pay them as disbursing agent.

Q I mean by check or by cash?

A Well laterly I paid everything—I guess during this period in dispute, I guess, I paid everything by check.

Q On what banks were your checks drawn?

A The National Bank of Commerce of Seattle.

Q You had an account there?

MR. McCORD: I move to strike out the testimony as not

responsive to the question, he asked how he was instructed to do and he answered how he did it.

MR. McCORD: I waive that, he answered yes.

A Yes sir, I had an account with the National Bank of Commerce as Special Disbursing Agent.

Q You drew on that account, in accordance with your instructions, for the payment of bills and expenses?

MR. McCORD: I object to that question, Your Honor, for the same reason. That is a conclusion as to whether he drew it in accordance with his instructions. The instructions would be the best evidence.

THE COURT: I overrule the objection. He may testify as to what he did.

MR. McCORD: I ask an exception.

THE COURT: Exception allowed.

Q You drew on that account, in accordance with your instructions, for the payment of bills and expenses?

A Yes sir.

Q Now, Mr. McCoy, I will ask you to examine this bundle of checks, which I hand you, and state whether, or not, they were issued by you while you were in the employ of the Government.

A Yes sir.

Q On each check that is your signature, M. P. McCoy, Examiner of Surveys and S. P. A.?

A Yes sir.

Q Sp A? Special Disbursing Agent?

A Yes sir.

Q Mr. McCoy, what is the meaning of the marginal notation, Voucher Number 6, or Voucher number so and so, on the check, what does that refer to?

A In making my quarterly statement, or rendering my quarterly account to the General Land Office, I submitted a voucher for each check, up until along about in September, or October, or November, 1909.

Q 1908 you mean, Mr. McCoy?

A Yes sir, it was in 1908, from that time on I used a new form of pay-roll that covered the pay-roll expenses, but I still used the voucher plan for sustenance and transportation.

Q And supplies?

A Yes sir.

Q Examine these checks again, Mr. McCoy, are the names of the payees real or fictitious persons in each instance?

A Fictitious.

Q That is, there were no such persons?

A No sir.

Q Does this apply to each of them to whom these checks were made out?

A Yes sir.

Q Examine the endorsements on the back, Mr. McCoy, and state whose individual endorsement is on the back of these checks, if you know.

A I do.

Q Are these endorsements, one or more on each check, are these the endorsements of real persons or fictitious persons?

A Fictitious persons.

Q Did the Government receive any services, or supplies or anything of value in exchange for these checks?

MR. McCORD: I object to that as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

MR. McCORD: Exception.

THE COURT: Exception allowed.

A No sir.

Q Did you receive the money on these checks, in each instance?

A Yes sir.

Q For the amount of the check?

A Yes sir.

Q So far as the appearance of these checks go, Mr. McCoy, are they made out in the same form and in the same manner

as you made out checks to real persons for real services rendered?

A They are.

Q That is, they are apparently regular on their face, are they not?

A Yes sir.

Q I believe I asked you if you made the endorsements on the back yourself?

A Yes sir.

Q Take, for instance, the first check, October 14, 1907, number one, payable to Albert Peterson, you had no such person as Albert Peterson rendering services at that time?

A No sir.

Q You endorsed it Albert Peterson and J. D. King?

A Yes sir.

Q And that way you received the money yourself?

A Yes sir.

Q That statement of fact is true of each check?

A Yes sir.

MR. McLAREN: I offer in evidence this bundle of checks, as plaintiff's Exhibit "A".

MR. McCORD: I object as incompetent, irrelevant and immaterial and the instruments not properly identified.

THE COURT: The objection is overruled.

MR. McCORD: Exception, Your Honor.

THE COURT: Exception allowed.

Checks referred to admitted in evidence and marked Plaintiff's Exhibit "A".

MR. McLAREN: At this time, Mr. McCord, I would like to submit the checks to the jurors, so that they may follow the testimony.

(Addressing the jury and exhibiting checks to the jury.)

These are the checks that have just been testified to. They are not quite in the order they were. If you will kindly keep them as they are. Each month is separated into a smaller package by itself. The voucher number that was referred to

in Mr. McCoy's testimony you will find in the upper left hand corner. Just pass those among you, will you, please?

(The jury examined checks embraced in Plaintiff's Exhibit "A".)

Q You got these blank checks from the National Bank of Commerce when you opened up your account?

A Yes sir.

Q Did the cancelled checks come back to you, Mr. McCoy, or were they sent by the bank to the Department?

A They did not come back to me.

Q Now while you were—During the period that is covered by these checks, you were doing some actual work for the Government, were you not, in the performance of your duties?

A Yes sir.

Q How often were you required to send in reports to the department in Washington?

A Weekly.

Q Did you send in weekly reports during this period covered by these checks in evidence?

A Yes sir.

Q I believe you testified that these checks, so far as appearance goes, are the same as real checks issued to real persons by you?

A Yes sir.

Q Now you spoke, a moment ago, Mr. McCoy, about a voucher system that was prevalent between you and the Department. I will ask you now to take this bundle of vouchers and examine them, these for the—marked for the month of October, 1907. I will take voucher number six as an example. This purports to be signed by Albert Peterson, for services rendered of the amount of twenty dollars, from October 5th, 1907, to October 14, 1907, and down below that is the signature of M. P. McCoy approving the same—Is that a genuine or fraudulent voucher?

A Fraudulent.

Q You signed the name Albert Peterson?

Q Then you approved it, with your own signature, as actually rendered to the Government for services?

A Yes sir.

Q Now will you go through the list of vouchers I hand you, for the month of October, 1907, and state whether or not they correspond with the voucher number noted on the margin of the checks for that same month—You have checked over these vouchers for the various months covered by the fraudulent checks shown as Exhibit "A"?

A Yes sir.

Q These vouchers are the vouchers referred to on the margin of the checks?

A Yes sir, they are.

Q How often did you send these vouchers to the Department?

A Quarterly.

A Every three months?

A Yes sir.

Q I now hand you another document, certificate for the month of October, 1907, is that your signature, M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q That refers, does it not, to the individual vouchers that you have just examined for that month?

A Yes sir.

Q That is a statement that you sent in as a part, or a summary of the quarterly account?

A Yes sir.

MR. McLAREN: I now offer in evidence, as plaintiff's Exhibit "B" the vouchers just testified to by the witness as having been sent in by him, quarterly, to the Department at Washington, D. C., for the following months; October, 1907;

MR. McCORD: And so on. I object to each of them as incompetent, irrelevant and immaterial and for the further reason that they show, in the light of the witness's testimony that they are all fraudulent.

MR. McLAREN: If the Court please, the very basis of this suit is that the checks were fraudulent and as a circumstance tending to rebut any evidence of negligence on the part of the Department at Washington, we purpose to show by those vouchers that they were apparently regular, that they complied in every respect with the departmental regulations, practice and custom, that there was nothing so far as the conduct of M. P. McCoy's accounts, contents of his accounts and reports and vouchers, to indicate to the Department of the United States that the fraud was being perpetrated at the time.

MR. McCORD: I don't think it makes any difference, Your Honor. I think it is wholly immaterial, irrelevant and incompetent whether he sent any vouchers or whether he didn't. The question is the liability on this check.

THE COURT: I will sustain the objection at the present. If the evidence is necessary you may offer it again in rebuttal.

MR. McLAREN: I would like to make a suggestion while the matter is fresh in Your Honor's mind. That is this: The defendant sets up in one of its affirmative defenses that if the government had been as careful as it should have been in checking up his work it would have detected this fraud at once, or at least after the first report was sent in. Now, the very purpose of this is to rebut that identical charge. If those reports were regular in every respect, then there was nothing to put us upon our guard or notice. The Court will allow us an exception.

THE COURT: I will allow an exception. If the evidence is material at all, it is material in rebuttal of the defendant's defense.

MR. McLAREN: Very well.

Q Mr. McCoy, state whether, or not, it is true that these vouchers, just introduced in evidence, were in accordance with the usual and regular method of handing in vouchers that was in use between you and the Department at the time that they were sent in?

MR. McCORD: I make the same objection to that, Your Honor.

MR. McLAREN: It may be stricken out by consent.

Q Is there anything in the—You say that, along about October, 1908, the Department changed this system of vouchers?

MR. McCORD: What do you mean by that?

MR. McLAREN: It just means that instead of the voucher plan, it was done by pay-rolls system.

MR. McCORD: What date was that made?

MR. McLAREN: October 8, 1908.

Q Examine these vouchers for October, 1908, and see if that was the new or the old system that was employed—

MR. McCORD: I make the same objection to that, Your Honor. It is referring to the vouchers which were not admitted in evidence.

THE COURT: Objection sustained.

MR. McLAREN: I ask an exception.

THE COURT: Exception allowed.

MR. McCORD: These same questions I suppose will all go out there, won't they, Mr. McLaren?

MR. McLAREN: I am just checking it down to each point. You better ask the question each time and have the Court's ruling on it.

Q That is for sustenance?

A Yes sir.

Q You retained the individual voucher system for supplies and material?

A Yes sir.

Q How is it, Mr. McCoy, that no vouchers are found for the last two months' issue of fraudulent checks, that is, the months of July and August, 1909—did you ever send in any vouchers for those two months?

THE COURT: I will sustain the objection.

Q It is true, is it not, that the vouchers that you sent in

for all of the other months were apparently regular and were in the usual form and manner?

THE COURT: Objection sustained.

MR. McCORD: Q When were you arrested?

A September, 1909, about September 1st.

Q You say, Mr. McCoy, that you sent in statements to the Department quarterly, will you examine these—Referring, Mr. McCoy, to the voucher for October, 1908, and the other vouchers covered by the fraudulent period, whom did you say these vouchers were sent to?

A To the Commissioner of the General Land Office.

Q And were sent quarterly?

A Quarterly.

Q Now will you explain, Mr. McCoy, what these accounts are, which I hand you, and which are signed by M. P. McCoy, special disbursement account?

A That is an account current for the quarter.

Q Covering the period from October 1st, 1907, to September 31st, 1907?

A Yes sir.

MR. McLAREN: Mr. McCord, that should be December 31st, the quarter commencing October 1st.

MR. McCORD: It is September here.

Q When you sent these quarterly account current in which you say you did quarterly, did you, or did you not, transmit with them the individual vouchers covering that same period?

A Yes sir.

Q Take the next one, from January 1st, 1908, to March 31st, 1908, is that your signature?

A Yes sir.

Q The same is true as to that?

A Yes sir.

Q The same is true as to all the vouchers down to a certain point?

A Yes sir.

Q Now calling your attention to the account current from July 1st, 1908, to September 30th, 1908.

A It is not true of that one. That is not the same thing I had in mind.

Q Take up the one, running from October 1st, to December 31st, 1908, and examine the leaflets on the inside, the outline of expenditures, the first item, October 31st, is the pay-roll—That was the pay-roll system?

A Yes sir.

Q Now examine all of these quarterly accounts current, which I hand you, they are all signed by yourself, are they not, as special disbursing agent?

A Yes sir.

Q These were sent in by you quarterly?

A Yes sir.

Q And, so far as their form is concerned, they were in due and proper form as was the customary practice of the Department?

A Yes sir.

Q Did these vouchers for expenditures, and also the pay-roll vouchers referred to in each of these accounts current, include these fraudulent checks, Exhibit "A"?

A Yes sir.

MR. McCORD: Do you want to offer those?

MR. McLAREN: Yes, I offer in evidence now as Plaintiff's Exhibit "C" the quarterly accounts current as follows: October 1st, 1907, to December 31st, 1907; January 1st, 1908, to March 31st, 1908; April 1st to June 30th, 1908; and so on down to June 30th, 1909.

MR. McCORD: I object to them as incompetent, irrelevant and immaterial.

MR. McLAREN: The Court, I presume, will make the same preliminary ruling?

THE COURT: The same ruling.

MR. McLAREN: Allow us an exception.

THE COURT: Exception allowed.

Q Mr. McCoy, you sent in no quarterly account for the period after June 30th, did you?

A No sir.

Q The quarterly account was not yet due at the time you were arrested, is that the reason?

A Yes sir.

Q Is there anything on the face of these quarterly accounts, or upon the individual vouchers or pay-rolls vouchers that indicates any irregularity, or that indicates the practice, or I should say the fraudulent practice or scheme that you were carrying on?

MR. McCORD: I object to that as calling for the conclusion of the witness, that being the very thing that the jury is to pass upon, and I object on the further ground that it is incompetent, irrelevant and immaterial, and not the best evidence.

MR. McLAREN: It raises practically the same question, Your Honor, as to the regularity of the reports he was sending in.

THE COURT: Objection overruled. I will sustain that.

MR. McLAREN: Beg Your Honor's pardon.

THE COURT: I will sustain the objection.

MR. McLAREN: I ask an exception.

THE COURT: Exception allowed.

Q State what that paper is.

A An account current.

Q For the period ending when?

A September 30th, 1907.

Q Beginning July 1st, 1907?

A Yes sir.

Q Any fraudulent items included in that account current?

A There were.

Q None of them covered by these checks—I will change the form of that question—Is that the usual form for the quarterly account that was in use?

A Yes sir.

Q Can you tell, from an examination of it, whether or not any of these items were improperly allowed?

A Not from an examination of this alone, I would have to have the checks that correspond and then I could tell.

MR. McLAREN: I offer plaintiff's Exhibit "D", a quarterly account.

MR. McCORD: I object to it as incompetent, irrelevant and immaterial and not properly identified.

MR. McLAREN: That is offered, Your Honor, for the purpose of comparison of the regular quarterly account that the witness was sending in with the fraudulent one covered by those checks.

THE COURT: I will sustain the objection.

MR. McLAREN: I ask an exception.

THE COURT: Exception allowed.

Q You are living in Spokane, Mr. McCoy?

A Yes sir, I am.

## CROSS-EXAMINATION

BY MR. McCORD:

Q How long did you say that you occupied the position of examiner of surveys and special disbursing agent?

A I had the position of examiner of surveys for about nine years, and during four or five years of that time I was special disbursing agent.

Q Prior to the time that you became special disbursing agent, who attended to that duty of disbursing?

A I did the disbursing. I paid the expenses of the men and rendered my account to the General Land Office and was reimbursed by check from the Interior Department.

Q Who advised you in the first instance?

A The Department advised me in the first instance, of what was necessary.

Q You advanced your own money?

A Yes sir.

Q After that time you adopted the system—

MR. MCLAREN: You don't mean that he adopted the system, the office adopted the system, of course.

Q After you became disbursing agent and also examiner of surveys, I will ask you where you maintained your office, if you had one?

A I had no office.

Q You attended to the surveys in Washington, Idaho and Montana?

A Yes sir.

Q Did the Government have any other agent, or assistant but you in the transaction of this business?

A No sir.

Q Did they have any other person, or individual or agent upon the ground to assist you in doing this work, or to check your accounts?

A Do you mean, now, assistants who I employed myself?

Q Employed by the Government.

A Well they were employed by me for the Government.

Q Who did you employ?

A My assistants in the field?

Q Yes sir.

A Well, I supposed—I employed assistants to assist me in making the examination of the surveys.

Q Did the Government employ any other men to aid you?

A No sir.

Q In checking your accounts as special disbursing agent—Did the Government check your accounts?

A The Department have special distributing agents—their usual custom.

Q They sent men to Seattle to examine them or do it at Washington?

A At the General Land Office at Washington.

Q Were they out here, at any time, by any body?

A Not that I am aware of.

Q How did they detect your fraudulent scheme?

A Mr. Good, I forget his initials, a special agent of the Land Office, discovered it there in Montana.

Q You were not checked up in your field work, or in your agents' work by anybody until shortly before you were arrested during the whole period of time that you were in the service of the Government, is that right?

A That is right.

Q How many surveys did you attend to—about, in a general way, about how much money did you expend legitimately in the service of the Government between 1900 and 1909?

MR. McLAREN: I object to that as incompetent, irrelevant and immaterial and also as calling for a conclusion of the witness.

THE COURT: The objection is overruled.

A I don't remember.

Q Give it to me approximately.

A Without looking up the records, I could not say.

Q In the year 1900, when you went to work for the Government in the capacity of examiner of surveys, until the time of your arrest in 1909, state approximately how much money you expended legitimately for the Government, how much per year would you estimate it?

MR. McLAREN: I make the same objection.

THE COURT: The objection is overruled.

MR. McLAREN: I ask an exception to each of those rulings.

THE COURT: Exception allowed.

A Well, I could not approximate it without looking over my—

Q Well, about how much business were you doing—You can tell about how much you would do in a year—I am not trying to trap you into anything.

A If I could give you an approximate statement, I would gladly do so, but without going over the records, I don't see how I could do so.

Q As much as five thousand dollars?

A No sir.

Q One half of that, twenty-five hundred dollars?

A No sir, nothing like that.

Q One thousand a year, would you say?

A The very outside limit would be one thousand dollars, I should say.

Q At any time, did the Government send any one else, so far as you know, to check up your work and see whether this money had been legitimately expended?

A No sir.

Q You have misunderstood the question, Mr. McCoy, have you not?

A It is only a surmise on my part, but I think there was a survey over in the extreme northeast part of Montana, over which several claimants were in litigation, and I think possibly that it was reported that I had not been on the ground to make my examination.

Q What did this work consist of, examining of surveys?

A The Government has public lands throughout these states and they make surveys of them.

Q This is done by United States Deputy Surveyors?

A Yes sir.

Q For the Government?

A Yes sir.

Q What did you do?

A Before the Government would accept it, I was sent into the field to make an examination of the survey, whether it was in acceptable form, whether it was correctly done.

Q Did you go out and run the lines over and resurvey it?

A I was to approximate ten per cent of the lines run by the party.

Q As much as ten per cent?

A Yes sir.

Q You were supposed to hire assistants to do that?

A Yes sir.

Q Surveyors?

A Yes sir.

Q Now, Mr. McCoy, you have identified a bunch of checks here, plaintiff's Exhibit "A", how do you know that these checks are the ones that you issued fraudulently—How can you tell?

A By recognizing my handwriting.

Q Every one is a different one, is it not?

A Yes sir.

Q And each individual check has a different signature—Do you mean to tell me that, from an examination of these checks that you can tell which ones you forged and which ones the signatures are legal?

MR. McLAREN: I object to the question as assuming that there is a different payee for each check, which is not the case. There were only twenty-nine different payees in the checks, Your Honor, but the checks themselves number over approximately a hundred.

MR. McCORD: I think the question is a proper question, Your Honor, to show how he got at this.

MR. McLAREN: I withdraw the objection.

A I identify these from my own signatures on the check.

Q When did you do that?

A At the time the check was issued.

Q When this list—When these checks were selected out, did you select them?

A No sir.

Q Who did?

A I couldn't tell you.

Q Did you go over the various checks that had been returned, with any body in Washington and assist him in picking the forged checks, that is, those that you forged?

A No sir.

Q You did not?

A No sir.

Q You have only made a cursory examination of these checks today, have you not?

A Yes sir.

Q You have not taken up each one individually and gone through them?

A Yes sir, each check.

Q Have you examined the signature on each one?

A Yes sir.

Q I would just like to have you tell me how you can remember five years after each one of these was taken which are genuine and which are not.

A Well, I know that, during the time that these were issued, that I issued nothing but fraudulent checks.

Q Did you issue, at any time during the period from 1907 to 1909, anything but fraudulent checks—You don't mean that?

A None except those that were payable to myself.

Q From 1907 to 1909 you did nothing then—you did not issue a single check that was valid?

A Except those to myself.

Q Except the two hundred and seventy dollars a month?

A Yes sir, my salary.

Q Everything else was fraudulent?

A Yes sir.

Q You did no work?

A I was doing work, but instead of passing checks to the parties that I employed in the field, I would pay them personally.

Q How much did you pay out in that way?

A I am unable to state.

Q About how much would these checks amount to, fifteen thousand dollars, about how much did you expend out of your own funds?

A I don't think I could even approximate it.

Q Would you say that you had expended five thousand, one third of that?

A No sir.

Q About four thousand dollars?

A About a couple of thousand dollars.

Q You have no way of arriving at that estimate?

A No sir, I have no records.

Q You think that you have spent about a couple of thousand, or it may be more?

A It may be more or it may be less.

Q It may have been as high as five thousand dollars?

A I don't think it was as high as five thousand.

Q As much as four thousand?

A I don't think it was over a couple of thousand.

Q What were you doing—You say that you paid some men for services rendered, and that you paid it out of your own money—Do you know of any of the men that you paid it to?

A No sir, I do not.

Q Can't you recall any of them?

A No sir.

Q What work did they do for which you paid them?

A Some were chainmen and some were flagmen and some were teamsters and some of them were stage drivers and some of them livery stable people.

Q You did go over onto the different surveys, during the period from 1907 to 1909, to September, 1909, you did carry on the checking of these surveys?

A Only a part of them. I did a few of them.

Q You were on all of them, were you not, with the exception of the one in northern Montana?

A No sir.

Q How many all together?

A I am unable to approximate. The records of the office will show, and I could not even approximate without having those records.

Q You made up reports on these various surveys and sent them in to the Government?

A Yes sir.

Q These reports showed that you had run the lines on at least ten per cent of the surveys, the deputy surveyor's work?

A Yes sir.

Q Is that right?

A Yes sir.

Q You mean to be understood that you did run ten per cent?

A Yes sir.

Q On some you did not run quite ten per cent?

A I only mean to approximate it.

Q You actually did the work of about ten per cent of the most of them?

A No sir, on a few of them.

Q On others you did part of the work and certified that you did it all.

A Yes sir.

Q On all of them, with the exception of in Northern Montana, you did some work?

A No sir.

Q What others?

A Well, in quite a majority I did not examine in the field at all.

Q Didn't do any field work at all?

A No sir.

Q You had nobody do it?

A No sir.

Q You cannot tell now a single man who worked for you, that you paid, between 1907 and 1909?

A No sir, not a single man.

Q Not a single man?

A No sir.

Q Where did you keep this money, at Seattle?

A No sir, on the ground. That is, wherever I happened to be making examinations of surveys.

Q What sort of a report would you send in with the vouchers, would you draw a plat showing the survey?

A No sir, I would send in the field notes covering the ground.

Q You would send in the field notes you had gotten from the deputy surveyor's work?

A I didn't get them from the deputy surveyor, I got them from the Surveyor General's office.

Q You used the same notes in sending them in?

A Yes sir.

Q If you had done the work individually, they would not have checked with the work in the Surveyor General's office, would they—If you had made these surveys and run your own lines, it would not have checked correctly with the work in the Surveyor General's office, would it?

A No sir.

Q In checking, did you simply try to run over the lines made by the deputy surveyor on the ground and find his monuments?

A Yes sir.

Q And during this time, a period of two years, you simply copied the notes from the Surveyor General's office?

A They were not copied, they were faked, we made our—

Q They were taken from the Surveyor General's office?

A The only data we had was taken from the Surveyor General's office.

Q They were reproductions of his notes?

A No sir.

Q You went to the Surveyor General's office and copied them?

A Yes sir.

Q Copied them as they were shown in his office?

A No sir, but I would not send in notes unless they would correspond in a general way.

Q You would modify them in some way?

A Yes sir.

Q Well, now then, how did you do when you actually re-run the lines, did you try to make changes in them?

A No, I would return the conditions as I found them. I

Q Is that right?

A Yes sir.

Q You mean to be understood that you did run ten per cent?

A Yes sir.

Q On some you did not run quite ten per cent?

A I only mean to approximate it.

Q You actually did the work of about ten per cent of the most of them?

A No sir, on a few of them.

Q On others you did part of the work and certified that you did it all.

A Yes sir.

Q On all of them, with the exception of in Northern Montana, you did some work?

A No sir.

Q What others?

A Well, in quite a majority I did not examine in the field at all.

Q Didn't do any field work at all?

A No sir.

Q You had nobody do it?

A No sir.

Q You cannot tell now a single man who worked for you, that you paid, between 1907 and 1909?

A No sir, not a single man.

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Q Copied them as they were shown in his office?

A No sir, but I would not send in notes unless they would correspond in a general way.

Q You would modify them in some way?

A Yes sir.

Q Well, now then, how did you do when you actually re-run the lines, did you try to make changes in them?

A No, I would return the conditions as I found them. I

would take my own field notes and my reports would be exact copies of my own field notes.

Q Wherever you found the monuments made by the surveyor, in those cases the notes would be identical, but in those notes that you faked from the notes in the Surveyor General's office—

A So far as the monuments and as to the topography, they were not the same.

Q When you faked the notes you were not the same?

A It is seldom that any two men write up the same notes after going over a certain line.

Q Now then, these checks that you draw, where did you cash them, Mr. McCoy?

A At different places around over the country.

Q Tell me how you would do it, take the first check for Albert Peterson, for twenty dollars—

A May I see the check, please?

(Exhibit "A" shown witness.)

Q The one on the top there, the back of the check shows—

MR. McLAREN: For the benefit of the jury, the check referred to now is October, 1907, the first one.

A That I cashed it through the National Bank, or the Columbia Valley Bank of Wenatchee.

Q Did you take it there yourself?

A No sir.

Q How did you arrange that?

A I sent these checks to this bank, under the name of J. D. King.

MR. McLAREN: You mean this particular check, you didn't send all of them?

A This particular check.

Q J. D. King, who was he?

A A fictitious name, the same as the rest. I sent these checks to the Columbia Valley Bank in the name of J. D. King.

Q By mail?

A Yes sir.

Q From where?

A From the points, I don't remember now.

Q Did the bank send these checks—

A I opened up an account with the bank and sent these checks for collection.

Q You opened up an account in the first place?

A On this particular check as J. D. King.

Q Did you go there to open it?

A No sir, by mail. I sent these checks by mail in the first place.

Q You opened an account by mail?

A Yes sir.

Q Then you checked it out in the same name?

A Yes sir.

Q You forged the name of King to these checks?

A Yes sir.

Q How did you get the money—How did they send it to you?

A Then this was checked out in my favor by this man J. D. King, this fititious King.

Q You cashed the checks in that way and sent to you by mail?

A Yes sir.

Q Were you ever in the Seattle National Bank?

A Yes sir.

Q Do you remember of any checks paid by them?

A Yes sir.

Q How did you manage that?

A Under the name of F. M. Clark

Q Did you open an account under that name?

A Yes sir.

Q You went in personally?

A Yes sir.

Q You would go in there and deposit them yourself?

A Yes sir.

Q From time to time?

A Yes sir.

Q And then check them out?

A Yes sir.

Q How about the Mutual National Bank, how did you manage that?

MR. McCORD: Montana National Bank it means, I suppose.

MR. McLAREN: Yes.

A That was done by mail, under another name.

Q Where from?

A From some part of Montana, wherever I happened to be. I was at different points in Montana.

Q Would you send more than one check at a time?

A Yes sir. I would generally send the bunch for the month.

Q And have them placed to your account?

A Yes sir, to the account of these fictitious names.

Q King?

A Yes sir, or Clark.

Q Did you have more than one fictitious name?

A Yes sir, the first was J. D. King.

Q How many accounts did you have with the various banks—You had one under the name of J. D. King and one Clark, and what else?

A That is all.

Q And this was done under these two names?

A Yes sir, as I remember.

Q Then you would forge the name of King on the check and make it payable to your order?

A Yes sir.

Q You didn't go and draw the money yourself?

A No sir. It was sent by draft to me at Seattle, and I would check it out from wherever I would happen to be.

Q When did you open the account with the National Bank of Commerce, or did you open it?

A The National Bank of Commerce, I opened an account there when they adopted this disbursing agent system.

Q Did you have the opening of the account yourself, or was it done from Washington?

A The deposit was made there from Washington, and I was notified of the fact.

Q The deposit was made from Washington?

A To my credit.

Q As M. P. McCoy, Special Disbursing Agent?

A Yes sir.

Q This was how the account was opened up?

A Yes sir.

Q You were directed to go there and leave your signature?

A Yes sir.

Q You went there and left your signature?

A Yes sir.

Q And you drew your money out of that account for various purposes connected with the Government?

A Yes sir.

Q Some that were legitimate, and some that were not, that is right, is it not?

A I checked that money out through other banks.

Q What—

A That is on checks cashed in other banks.

Q You drew checks?

A Yes sir and cashed the checks.

Q Every one of these checks contains your genuine signature?

A Yes sir.

Q And all of these in this bunch, to the best of your knowledge, are fictitious?

A Yes sir.

Q Is there anything on the face of these checks to advise or indicate the fact that there was anything fraudulent about them, was there?

MR. McLAREN: Which bank, the National Bank of Commerce?

A No sir, they are regular in every way.

Q The contents and endorsements are what the law required to be put upon them?

MR. McLAREN: I object to that as calling for a conclusion of the witness.

THE COURT: I sustain the objection.

Q That is on all of them?

A Yes sir.

Q Did you put the—I notice some of them have a voucher, number one voucher from the 6th to the 16th you showed these vouchers to the bank, did you?

A No sir, these vouchers were sent with my quarterly report to the land office at Washington.

Q You put in these all of the pay-rolls and sustenance and so on—I notice that some of them, or at least I thought some of them had no—did not have vouchers on them?

A The last ones, several of them are there not?

Q Some of these in April—In August 1909, examine these for August, 1909, did you put notations"—

MR. McCORD: I withdraw that question.

Q Did you exhibit your pay-rolls to the bank?

MR. McCORD: It is on the next page.

A No sir.

Q I see these checks, one bunch of them seems to have been paid direct, or part of these checks, take for instance the one for one hundred dollars, to J. D. King, the check is dated August 31, 1909, for one hundred dollars, number 13, and August 31, 1909, for sixty-two dollars, in fact all of these for August, with the exception of one or two seem to have been drawn direct without the intervention of any other bank, were they not?

A No sir, these were paid through the Seattle National Bank and are stamped indistinctly on the back of them there.

Q They were paid through the Seattle National Bank?

A Yes sir.

Q Now you referred to your instructions a while ago, from the Government, they authorized you, when this deposit was put there to sign checks for this money in drawing it out, did it not?

MR. McLAREN: I object to that question as calling for a conclusion of the witness and not the best evidence as to whether the letter of instructions authorized him to sign these checks.

(Discussion.)

THE COURT: I will overrule the objection.

A Yes sir.

Q You had authority from them to draw checks?

A Yes sir.

Q You showed that authority to the bank, I presume, you must have, did you not?

A Yes sir, I showed my letter of instructions to Mr. Maxwell, who was at that time cashier of the bank.

Q And these instructions that you got, you just exhibited them to him did you not?

A Yes sir.

Q You didn't give him any other instructions?

A No sir.

Q Just let him read your instructions?

A Yes sir.

Q The bank had no other instructions, except from reading your letter?

A I don't know, but I presume—

Q I don't want any of your presumptions—You don't know?

A I don't know. That letter instructed me to sign checks as Special Disbursing Agent.

Q No limitation was placed by that letter, or was placed on the bank by that letter, to paying any checks signed by you?

A No sir.

Q There were no conditions, it had been remitted direct to

the bank to take your signature, and directing you to draw it out upon your signature, that was the size of these instructions, was it not?

A Yes sir, the purport of them.

Q That is the substance?

A I don't remember the wording exactly, but that is the substance or object of the letter.

Q To advise the bank that you had authority to draw any money placed to your credit as Special Disbursing Agent?

MR. McLAREN: I object to that as calling for a conclusion of the witness as to the authority contained in the letter.

THE COURT: I overrule the objection.

MR. McLAREN: Exception.

THE COURT: Exception allowed.

A Yes sir.

Q Now the bank, every month, rendered you a statement of your account, did it not?

A Yes sir.

Q And the vouchers, or the checks that you had used were not returned to you?

A No sir.

Q A list of them was returned to you in a statement of account?

A Yes sir.

Q Also the vouchers themselves and a statement were sent to the Department at Washington by the bank—That is the checks were sent to Washington?

A I don't know.

Q You don't know what the custom was?

A I presume they were but I had no means of knowing.

Q Your account was balanced up every month?

A Every quarter, yes sir.

Q Every month?

A No sir.

Q Was it every quarter?

A Every quarter.

Q The cancelled checks were sent to Washington—You understand that it is customary to send them to Washington?

A Yes sir, I do now.

Q These checks, so far as you know, were all sent to Washington at least every three months?

A Yes sir, I presume they were.

Q So that your account was balanced up every month between you and the bank?

A Yes sir.

Q The bank rendered you a statement every month?

A Yes sir.

Q They didn't wait until the end of the quarter, but rendered it every month to you?

A Yes sir.

Q They didn't render any to the Department at Washington?

A I don't know, I am sure.

Q Did the Government, prior to September, 1909, ever make any complaint or criticism of your acts or your dealings with the Government in regard to these examinations of surveys?

A No sir.

Q They never offered any criticism at all of any kind?

A Oh, once in a while there would be some item suspended for explanation, as for instance a telegram, a copy of which would have to be sent. Where I had failed to send a copy, or something like that, or some clerical error.

Q As I understand it, you sent in until October, 1908, you sent in to the Department at Washington vouchers for everything that you expended?

A Yes sir.

Q Purporting to be signed by the men who had done the work or furnished the supplies?

A Yes sir.

Q That is true, is it not?

A Yes sir.

Q These were sent in monthly, were they not?

A Prior to the adoption of the Special Disbursing Agent, yes sir.

Q After the adoption of the Special Disbursing Agent scheme, they were sent how often?

A Quarterly.

Q When was the disbursing agency feature adopted?

A I think after the first of October, 1908. That is when we began.

Q After the account was opened up in the bank in your name as Special Disbursing Agent and as examiner of Surveys, from that time you sent in your vouchers quarterly?

A Yes sir.

Q And continued to do that until October, 1908, did you?

A I continued to do that until my arrest in 1909, September, 1909.

Q You sent in the vouchers, as well as the payrolls?

A No sir, sent in the payrolls after we adopted that plan.

Q October, 1908?

A Yes sir, prior to that time sent in vouchers.

Q You continued to send in payrolls quarterly after October, 1908.

A Yes sir.

Q So that throughout the whole history of these transactions, from the time you opened the account in the Bank of Commerce, until you were arrested, you sent in, every three months, vouchers for every dollar you claim to have expended?

A Yes sir.

Q These vouchers were used until October, 1908?

A Yes sir.

Q After October, 1908, the labor and services went in under the payroll?

A Yes sir.

Q You continued to have each member of the payroll sign that voucher?

A Yes sir.

Q They signed the payroll, each member that you claimed pay for services?

A They signed the payroll, yes sir.

Q Other services were on independent vouchers?

A Yes sir.

Q That was up to the time of your arrest?

A Yes sir.

Q The Government, at all times then, from 1907 up until the time of your arrest on September 1st, 1909, had these vouchers in its possession?

A Yes sir.

Q Now the Government could, very easily, by sending men out to check up the ground work and field work have ascertained that you had never been over it, could they not?

A Yes sir.

Q And that is the way that they finally stumbled onto the illegal practice?

A Yes sir.

Q Or it was an easy matter, was it not, to have found out from the people in the vicinity that you had not done this work, was it not, Mr. McCoy?

A Except in the sparsely settled districts.

Q If they had made any investigation at all, or if they had enquired for any of these men you claim to have paid money to, they could have ascertained that the men could not have been produced?

A Yes sir.

Q So that by the simplest sort of an investigation they could have found out that there were no such people in existence as those whose names you had given?

A Yes sir.

Q Did they ever inquire from you, as to the men who composed these accounts, as to their residence or postoffice address of any of these individuals to whom you claim to have paid money?

A I think each voucher shows the postoffice address of each man who signed the voucher.

Q And all of these were fictitious and there was no such person at that place?

A No sir.

Q And a letter addressed to them would have been returned uncalled for?

A Yes sir.

Q I don't want to embarrass you, Mr. McCoy, but I want to ask you the question because I think it is necessary—When were you arrested and where?

A It was about the first of September, 1909.

Q Where were you arrested?

A At the Lincoln Hotel at Seattle.

Q With what offense were you charged?

A The offense of embezzlement of Government funds.

Q Of what particular embezzlement were you charged with?

A I don't remember.

MR. McLAREN: I will stipulate that he was indicted, arrested and sentenced for embezzlement covered by the checks shown in Exhibit "A."

MR. McCORD: You said you would produce the indictment.

MR. McLAREN: Do you want the indictment now?

MR. McCORD: No, you can put it in. The indictment will be introduced showing the charge against him.

A Do you know what particular checks made up those you were arrested for embezzling on? What the particular funds were?

A I don't remember. I was rather embarrassed at the time the indictment was read to me, and I don't remember.

Q You were sentenced in Seattle?

A In Tacoma.

Q Were you tried?

A No.

Q You pleaded guilty to the indictment and you say that you don't know what was in it?

A No sir, I don't remember now.

Q You are now out on parole?

A No sir, I am at liberty, my parole expired on the 19th of last month.

Q So you are completely freed?

A Yes sir.

Q You are not pardoned?

A No sir.

Q So that your civil rights have not been restored?

A No sir.

Q Did you not make any application in person?

A No sir. I made an application for a parole and it was granted.

Q Mr. McCoy I will have to go into those a little more in detail, as I don't know how all of these different names here, that is the names of H. M. Benson, A. C. Jenkins, Charles Paine, George K. Cooper, E. M. Bassett, Joe Mikel, A. J. Whitney, F. W. McCulley, George D. Cook, F. M. Clark and J. D. King,—

MR. McLAREN: Those are the names referred to in the checks—"all covering the month of August, 1909, I want you to tell me, if you can, how you can go through those and tell now, after the elapsing of five years, which ones of these signatures are fraudulent, and which are not, or that all of them are—I ask you whether you can do that from any independent examination of the signatures, as they now appear, or can you tell only because you were not doing any work during this period of time?

A I could not identify these from these fictitious signatures, but I can identify them from my own signature having issued the checks.

Q Well your signature does not appear on any of those checks—that is the signature of M. P. McCoy, except as the drawer of the check?

A That is all.

Q Can you independently say that all of these names placed on these checks and made by you, can you tell now from an examination of those signatures at this time—I don't see how it is possible—Tell me whether if you didn't have these passed up to you, and without any other information, whether you could tell whether these were forgeries?

A No sir, it would be impossible for me to tell.

Q If you saw the checks you could not tell that they were forgeries, except, as you say, between 1907 and 1909, you say that you did not issue any legitimate checks?

A Yes sir.

Q That is the only way you can tell?

A Yes sir.

Q That is also true of the vouchers, is it not, you could not tell that these were forgeries on the vouchers from an inspection of the vouchers at this time?

A Yes sir.

Q How?

A Simply by knowing that they were fraudulent.

Q I say by an examination of the voucher itself, independent of your personal knowledge, you could not tell, it would be an impossibility?

A No sir.

Q Now, Mr. McCoy are you not mistaken in saying that, from 1907, the date of the first of these checks, October 14, 1907, to September 30, 1909, two years that you did not issue a single genuine check?

A Not as against the National Bank of Commerce.

Q How do you know that? You transacted business and had men in your employ, and were paying them from some source or other, now is it not possible that some of these checks that you drew were payable for a legitimate purpose and to the men who earned the money?

A No sir.

Q Why do you say that?

A Because whenever I incurred expenses in the field I paid it to the individuals themselves, and in order to carry this thing through I would issue checks against the National Bank of Commerce but only those that were fictitious.

Q What work were you doing from October, 1907, to September 30, 1909, what particular surveys were you examining?

A Surveys in the states of Washington, Idaho, and Montana. The records would show the title of each survey that is to whom contracts were let, but who they were now, I cannot recollect.

Q You are sure that you never drew any checks in their favor on the National Bank of Commerce?

A I am sure of that.

Q But you used the money that you got from the National Bank of Commerce in paying them?

A Yes sir, except those payable to myself.

Q The money that you got on these fraudulent checks you used, in part, to pay these men?

A Yes sir.

Q How much you have no means of knowing?

A No sir.

Q Otherwise that it is from one to four thousand dollars?

A Yes sir, somewhere within those sums.

Q But you did render services to the Government, valuable services, during that period, did you not in examining these surveys?

A Yes sir.

Q And employed men to assist you in getting the information you did furnish the Government?

A Yes sir.

Q And you did have men employed by you in examining surveys for the Government?

A Yes sir.

Q I would like to—if you can give me some more correct information as to the amount of money you spent on each particular survey, the number of men you would employ and

I would like to have you try to recall, Mr. McCoy, about how much money you spent legitimately from 1907 to 1909, that you paid for out of funds that you carried in this bank?

MR. McLAREN: Q Is it your testimony, Mr. McCoy, that the actual services which you did pay for during this period, were paid out of these fraudulent checks, or did you put in a personal check to pay for these services?

A I got this money individually.

Q Out of the proceeds of your personal checks?

A I paid them with my own money.

Q I want to get this clear—During the time that these fraudulent checks were sent in by you, you also sent in checks payable to yourself for different amounts, did you not?

A Yes sir.

Q Was it out of these checks, payable to yourself, that you paid the men that you had employed, or did you pay these men out of the proceeds of these fraudulent checks?

A I paid them with my own money. How I obtained that money, I obtained part of it by my own salary and over time and part of the money I got from the fraudulent checks.

Q You kept all of this money in the bank?

A Yes sir.

Q The National Bank of Commerce?

A Yes sir.

Q When you got money from these fraudulent checks and legitimate money, you put them all together in one account?

A Yes sir.

Q Whether it was from one source or the other, part was from fraudulent sources and part from other sources?

A Yes sir.

Q You could not tell which?

A No sir.

Q You have no doubt but that you paid out from one to four thousand dollars for the Government in this way?

A Yes sir.

Q Most of it came from the fraudulent checks, because there were more of them?

A Yes sir.

Q So that you would say that the biggest part of what you did pay necessarily came from the money that you got on these fraudulent checks, that is the legitimate conclusion, is it not?

A Well, the amount was so small that I was paying out, compared with what I was getting in, that I would not have any means of knowing where it did come from.

Q It was all mixed together?

A Yes sir.

Q The money which you did use to pay these legitimate expenses and labor was money paid out of your own personal bank account into which you had put the money realized from these fraudulent checks?

A Yes sir.

Q That is right, is it not?

A Yes sir.

Q Now take, for instance, the surveys for the year 1907, can you tell where you examined one—just recollect one where you did any work on it?

A Without having the records before me, I could not tell that.

Q It is possible, is it not, that you have paid out more than four thousand dollars?

A No sir, I should not estimate it any higher than that.

Q You think that four thousand is the maximum?

A Yes sir.

Q Would you consider that approximately the sum?

A I should say a couple of thousand. It might have been more or it might have been less.

Q It might have been as much as four thousand?

A It might have been over two thousand.

Q The last one of these vouchers was sent on September 30, 1907?

A No sir the last one went in—

Q June 30, 1909?

A Yes sir, June 30, 1909.

Q You didn't send in any after that?

A No sir.

Q But you drew quite a number of checks after that did you not?

A Yes sir, I drew checks at the end of July and to the end of August.

Q Did you keep any account in any other bank than the National Bank of Commerce as Special Disbursing Agent?

A No sir.

Q Did the Government not receipt to you for these various accounts that you sent in?

A No sir, it was not their practice, but they did, however, at the end of the year send me a statement from the auditor of the interior department of my account and including the account for the past year.

Q They verified your account at the end of 1907, did they?

A Yes sir.

Q And verified it at the end of 1908?

A Yes sir.

Q Tell you it was correct?

A Yes sir, letters were sent me from the Auditor of the Interior—from the Auditor of the Treasurer of the Interior Department and sent me these statements, at the end of these periods, stating that my account had been examined and found correct, or that there were some slight discrepancies and that they needed correction, or something of that kind.

Q What officer of the National Bank of Commerce, did you do your business with, Mr. Maxwell?

A It was the young man who had charge of the disbursing of the Government funds in the rear of the office, I don't remember his name, in fact I never knew his name. He was one of the bank tellers.

Q Ever do business with Mr. Backus?

A No sir.

Q Did you ever do business with Mr. Stacey?

A No sir.

Q Did you ever do any business with Mr. Seewell?

A No sir.

Q Mr. Maxwell, you did show him your credentials?

A Yes sir.

Q Did you turn your signature over as Special Disbursing Agent?

A Yes sir.

Q And your written instructions were to show your orders to the bank, were they?

A I cannot recall exactly, but I was notified of this sum being placed to my credit in this bank.

Q You were authorized to draw it out on your signature?

MR. McLAREN: I object to that, Your Honor, as calling for a legal conclusion of the witness.

(Discussion.)

THE COURT: I overrule the objection.

MR. McLAREN: Exception.

A Yes sir.

Q You showed that to the bank?

A Yes sir.

Q You didn't tell them anything about your being unlimited in your power to draw that money?

A No sir, I simply showed them my letter.

Q The letter didn't contain any limitations on your powers?

A No sir.

Q It was an unconditional authority?

A Yes sir, I think the checks were to be signed by myself as Special Disbursing Agent.

Q With that exception there was no limitation?

A No sir.

Q There was no limitation on the authority of the bank to pay you money?

MR. McLAREN: Same objection, Your Honor.

THE COURT: Objection overruled.

MR. McLAREN: Exception.

THE COURT: Exception allowed.

A No sir. The letter gave me authority to draw it out myself on my own order, but I don't think I could have drawn any checks under that authority payable to myself.

Q It didn't say anything about it at all?

A Well I was to draw this money as Special Disbursing Agent and I don't remember that it limited me at all.

Q You don't think that anything was stated as to any limitation at all?

A I don't think that there was any limitation stated.

Q When you say that you don't think that you could draw checks in favor of your own order, you are getting that from information other than that contained in the letter?

A Yes sir.

Q There was nothing in the contents of that letter that indicated that you could not draw it in your own favor?

A No sir, not that I can remember.

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### RE-DIRECT EXAMINATION

BY MR. McLAREN:

Q When were you paroled out, Mr. McCoy?

A March 15th, last.

Q March 15, 1911?

A Yes sir.

Q You have been steadily employed in the City of Spokane for how long?

A Since June 15th.

Q For what firm?

A W. A. Richards, architects.

MR. McCORD: That ought to be Ritchie.

MR. McLAREN: Ritchie, yes.

Q Since when?

A June 15, 1911.

Q You have never had any difficulty or trouble with the Government before this transaction of the fraudulent checks during all the time you worked?

A I never had any trouble with any body, the Government, or any body else.

Q Under your authority from the Government you had no authority to pay out money, or draw checks against the account, except in payment of legitimate bills?

MR. McCORD: I object as incompetent, irrelevant and immaterial, and asking for an interpretation of a question of law by the witness.

MR. McLAREN: I think that is proper, Your Honor, in view of the questions asked upon Cross Examination.

MR. McCORD: (Reading) "Under your authority from the Government, you had no authority to pay out money, or draw checks against the account, except in payment of legitimate bills?" Now, that is the very question here, Your Honor. I object to it as incompetent, irrelevant and immaterial and asking for a conclusion and asking for the interpretation of the contract, what his authority was.

THE COURT: I sustain the objection.

MR. McLAREN: An exception.

THE COURT: Exception allowed.

MR. McCORD: (Reading) "When you told Mr. McCord that your letter of instructions"—

MR. McLAREN: That goes with the same ruling. Turn over to the next page.

MR. McCORD: The next page.

MR. McLAREN: Begin next at the second question on page 50.

MR. McCORD: The second question?

MR. McLAREN: Yes.

Q During the time covered by these checks, you were not doing much of any work—Were you doing anything in April, 1908, do you recollect being over at Great Falls, Montana?

A I don't remember anything specially.

Q I hand you four vouchers, numbered fifteen, sixteen, seventeen and eighteen, commencing April, 1908, to J. D. King, A. M. Anderson, F. M. Clark and Fred Evans, state whether these were fraudulent?

A Yes sir.

Q You received the money on these vouchers?

A Yes sir.

MR. McCORD: I make the same objection to that, if Your Honor please. I object to it as irrelevant, incompetent and immaterial.

MR. McLAREN: I offer in evidence now these vouchers, Plaintiff's Exhibit "E," being Nos. 15, 16, 17 and 18, upon this theory: it developed on cross examination by Mr. McCord that there was a possibility, at least a theory that part of the proceeds of these fraudulent checks might have inured to the benefit of the government in payment, as the witness testified, in cash to the men whom he had employed during the period covered by the checks. I now offer to show by these exhibits that in addition to monies received by him from the fraudulent checks, he handed in vouchers which I now offer in evidence, covering a portion of the same fictitious persons, Anderson, Clark, King and the rest of them. My position is clear. Counsel contends and will contend I presume from the line of cross examination developed that even although the money was all obtained irregularly and fraudulently from the bank, yet if as a matter of fact he applied a part of that money to the payment of actual bills, that they are entitled to show that, as the government would not be damaged by that appropriation of that money. Now, I am offering to prove by these exhibits that there were other monies which were used in payment of these actual expenses.

THE COURT: As at present advised, I will rule against you, Mr. McLaren. If I should change my mind about it, I will let you introduce these. I don't think they are material in this case at all.

MR. McLAREN: The Court will allow us an exception.

THE COURT: Exception allowed.

Q I hand you voucher for November, to yourself, for two hundred and seventy dollars—Can you state whether or not you worked during that month of November, 1907?

MR. McCORD: I object to that as immaterial. They are offering that for the same reason I suppose, Your Honor. He drew his own check, drawing two hundred and seventy dollars a month.

THE COURT: I will sustain the objection.

(Discussion.)

THE COURT: I will sustain the objection.

MR. McLAREN: Allow us an exception.

THE COURT: Exception allowed.

MR. McLAREN: Now, the same objection and the same ruling to the other voucher for December, I presume.

MR. McCORD: How far down is the next one, Mr. McLaren?

MR. McLAREN: I offer in evidence Plaintiff's Exhibit "F," being vouchers for the months of November and December, 1907, in favor of the witness.

MR. McCORD: Same objection.

THE COURT: Sustained.

MR. McLAREN: An exception.

THE COURT: Exception allowed.

MR. McCORD: Where do you want me to read now?

MR. McLAREN: I think the next question is open to question yet.

MR. McCORD: All right. Which one is the next one?

MR. McLAREN: "Now I hand you a certificate, signed by yourself"—on page 51, about the middle of the page.

MR. McCORD: Yes.

Q Now I hand you a certificate, signed by yourself, for the month of April, 1908, and I will ask you, if, on the first page of this, that is your signature "M. P. McCoy, Examiner of Surveys"?

A Yes sir.

Q Calling your attention to the item of disbursements, as shown by that itemized statement, and calling your further attention to page two, to a certain entry of expenditures, under date of April 8th. "To J. J. Carlton, Darby, Montana, for hire two horses and buggy, with driver, expenses, etc., eighteen dollars," is that part of a voucher that you returned under that heading?

A It is.

Q Calling your attention to the second portion, marked page three, under date of April 30th, 1908, "To J. D. King, Great Falls, Montana, for services as chainman, from April 19 to 30 inclusive, twelve days, twenty-four dollars." Is that the same J. D. King the fictitious person?

A Yes sir.

Q To F. M. Clark, Great Falls, Montana, services as chainman, twelve days, two dollars, twenty-four dollars, is that the same fictitious person?

A Yes sir.

Q Fred Evans, Conrad, Montana, for board and lodging assistants, J. D. King and F. M. Clark, John Howard, E. M. Roper and A. M. Anderson, forty-five dollars and six cents, those are the same fictitious persons?

A Yes sir.

Q Calling your attention to page two of this itemized statement, April 21st., "To J. L. Murray, Helena, Montana, for board and lodging assistants J. D. King and F. M. Clark April 21, four dollars." Those are fictitious persons are they?

A Yes sir.

Q Ray Jones, Great Falls, Montana, for board and lodging assistants, J. D. King and F. M. Clark, April 22nd, three dollars, that is fictitious, is it not?

A Yes sir.

MR. McLAREN: I offer in evidence now Plaintiff's Exhibit "G," being the certificate of Mr. McCoy during the month

of April, 1908, consisting of two separate parts, the substance of which has been referred to in the previous questions.

MR. McCORD: I have no objection to those two.

THE COURT: They may go in.

Certificate referred to admitted in evidence and marked Plaintiff's Exhibit "G."

Q You testified a while ago that during this period covered by the fraudulent checks, you were doing some work, is that true?

A Yes sir.

Q That is on different surveys?

A Yes sir.

Q You also testified that you had paid these men money, did you employ the cash which you received on your own checks?

A Yes sir, I paid them in cash.

Q You testified further that you thought that the cash might have been from the proceeds of these fraudulent checks?

A Possibly, I mean, that is all.

Q Is it not true, as shown by the statement in Exhibit "G," which I have just shown you, that you had also received other money which you were not entitled to and which you didn't earn which is not covered by these checks?

A Yes sir.

Q When you say that possibly some real services may have been paid out of these fraudulent checks, you don't know whether it is true or not?

A Yes sir, I know it was true.

Q How much was there of it?

A Well I am unable to tell how much.

Q How can you tell that it was not paid out of these fraudulent checks?

A I cannot tell that it was out of these fraudulent checks, but it was out of my money.

Q You cannot tell that it was not paid out of these fraudulent checks?

A No sir, I paid it out of money that I obtained whether it was from my salary, per diem or from these I cannot say.

Q Do you recall, Mr. McCoy, how the expenses covered by these vouchers, for April, 1908, were paid to these fictitious persons named in there—To refresh your recollection, I will call your attention to the month of April, 1908, as to the fraudulent checks in this case do you recollect how they were paid?

A That was done prior to my appointment as Special Disbursing Agent.

Q In 1908, this is in April and the appointment was—

A I don't understand why this—During part of this year I was addressed as special agent of the General Land Office, and I acted as special agent under instructions from the commissioner of the General Land Office, and during that time I was examining applications for surveys for different people around there over the different states in which I traveled and during that time I was acting as special agent and not as disbursing agent, and this month covers both, where I was acting as special agent and also as examiner of surveys.

Q How about May, 1908?

A Yes sir.

Q How about March, 1908?

A Yes sir, the same way.

Q I will call your attention to the itemized report for March, 1908, that is your signature M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q Disbursements as shown by within itemized statement and vouchers, one hundred and seventy-five dollars and twenty cents, that is the amount of the items set forth on the inside pages, is it not?

A Yes sir.

MR. McCORD: I object to that, Your Honor, as irrelevant, incompetent and immaterial and not the best evidence. The document itself Your Honor ruled out.

MR. McLAREN: I beg pardon.

MR. McCORD: It is the contents of an instrument that the court has already ruled would not be admitted.

THE COURT: I sustain the objection.

MR. McLAREN: Exception.

THE COURT: Exception allowed.

Q Is it not true, Mr. McCoy, that all of the actual services which you did incur, during the period covered by the fraudulent checks, were as a matter of fact itemized in your various reports, sent in and paid by the Government's money, either to you or to the persons whom you had hired by checks outside of these fraudulent checks which you have before you?

A Yes sir.

Q Then it could not be possible, if this is correct, that you paid for any of the actual services rendered out of the fraudulent checks, that would not be possible?

A It is possible in this way, that I had money obtained by fraud and also money obtained legitimately—

Q Is it not also true that all the money that you obtained legitimately would be paid through vouchers and checks other than these fraudulent ones?

A No sir.

Q Then why did you send in such a voucher as is shown on March, 1908, and also in April, 1908?

A That is when I was acting as special agent for the General Land Office.

Q Not disbursing any?

A I was not disbursing anything, but I was paying my railroad expenses and hotel bills.

Q During these two months is it not true that you put in accounts for King and Clark—

A That was during the latter part of the month, April when I was acting as examiner of surveys.

Q I believe that you testified that you signed all of these vouchers and reports shown in Exhibit B, as M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q Mr. McCoy in reference to your field notes, which you say were faked, during the time that you were not actually doing the work, as I understand your testimony in answer to Mr. McCord, you modified the field notes of the Surveyor General so as to give them the appearance of being genuine?

A Yes sir.

### RE-CROSS EXAMINATION

By Mr. McCORD:

Q You say that these vouchers which you refer to, Exhibit "G," covering the months of March and April, 1908, that then you were acting as special agent for the land department?

A During part of the time.

Q And in that case you rendered an account of the work you did and received the money for it, did you?

A That is the way I remember it.

Q Well now then, how long did you act as special agent of the department approximately?

A Well during each spring, for a month or two.

Q So that in 1908 and 1909 you were also acting as special agent?

A Yes sir. No excuse me, in 1909 I am under the impression that I did not act as special agent.

Q During this whole time you draw two hundred and seventy dollars a month, you were busy with government work all the time yourself?

A Yes sir.

Q Do you consider that you earned the two hundred and seventy dollars a month, yourself?

A No sir. I didn't when I was acting as special agent.

Q Part of the time you say you were—you had men employed doing legitimate work making surveys during the time that you were entitled to your salary?

A Yes sir.

Q On most of them covering this early period, you yourself

were engaged, were you not in tending to the work you were having done, you said that you had quite a considerable work done in examining surveys and running lines and you were employed by the Government and you were receiving money from the Government at that time, were you not?

A Yes sir.

Q So that during most of your time you would consider that you were fairly entitled to the money that you drew, two hundred and seventy dollars per month?

A No sir, not during the last two years, I didn't consider that I did.

Q They paid you your salary?

A Yes sir.

Q They never objected to paying it at any time, they never raised any question about paying you?

A Yes sir, small ones.

Q They never sued you to recover it back?

A Not that I am aware of.

Q How long a time, Mr. McCoy, did you spend in the penitentiary at McNeil's Island?

A A year and a half.

Q How long were you sentenced for?

A Three years.

Q You were paroled after about a year and a half?

A Yes sir.

## RE-DIRECT EXAMINATION

By MR. McLAREN:

Q You have just testified, Mr. McCoy, that you received your salary during all of that period and that the Government didn't protest the payment of your salary—I presume that you refer to your monthly vouchers which are shown in Plaintiff's Exhibit "B"?

A Yes sir.

Q And which you have certified as being correct?

A Yes sir.

Q On these vouchers is the alleged residence of the fictitious persons in each case, the place where they were supposed to have been living at that time?

A Yes sir.

Q You didn't do any work during the summer of 1909?

A No sir.

Q Did you ever do any work—

A Except early in the spring.

Q Can you tell approximately how many months pay you had rendered services for during the period covered by the vouchers you sent in—I don't mean exactly but somewhere nearly?

A No sir, I could not tell you that.

Q Can you tell by consulting the names and addresses, Mr. McCoy?

A No sir, the only way I could tell it would be by having a list of the surveys, but I could not tell it from any information that I have here.

Q Could you tell from the Great Falls, Montana—

A I was there mostly as special agent.

Q During the period covered by these checks, however?

A Yes sir.

Q There were no checks between January, 1908, and May, 1908, during the spring while you were examining these surveys and not disbursing any?

A No sir.

MR. McLAREN: In view of the cross-examination developed by Mr. McCord, I now renew my offer in evidence of Exhibit "B," being the vouchers that were sent in by the witness and concerning which Mr. McCord examined the witness freely upon cross-examination.

MR. McCORD: I object to it as incompetent, irrelevant and immaterial.

THE COURT: I sustain the objection.

W. G. GOOD, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. McLAREN:

Q Will you state your name to the Clerk, Mr. Good?

A W. G. Good.

Q W. G. Good; G-o-o-d?

A Yes sir.

Q What is your position with the government service, Mr. Good?

A Special agent of the General Land Office.

Q How long have you held that position?

A A little over seven years.

Q How long have you been in the government service all told, Mr. Good?

A Seven years.

Q Approximately?

A Seven years the first of February.

Q Were you in that position in the summer and fall of 1909?

A I was.

Q Are you familiar with the method and custom of the department at that time as to checking up the surveys of public lands that had been made by contract? If you are not, say so, and I will—

A Wouldn't say that I am familiar with checking up surveys.

Q No, I mean the method.

A Yes sir, in a way, yes sir.

Q Will you explain to the jury, Mr. Good, how the government has its public lands surveyed in the State of Washington and adjoining states and then how those surveys are checked up, if in any way.

MR. McCORD: Are you a surveyor? Have you ever been in the land department as a surveyor?

THE WITNESS: No sir, I am not a surveyor.

MR. McCORD: I don't think the witness is qualified to testify.

MR. McLAREN: I will qualify him.

Q Are you familiar, Mr. Good, with the method and practice of the department in making its surveys and checking them up?

A Well, I am familiar with the method of letting contracts and the way they are checked up by the examiner of surveys, and so forth.

Q That is what I mean.

A Yes sir, I know how that procedure is gone through with.

Q Now, will you explain that procedure to the jury?

MR. McCORD: I object. The witness has not shown himself to have qualifications at all.

THE COURT: I will overrule the objection.

MR. McCORD: I object as incompetent, irrelevant and immaterial.

Q Proceed Mr. Good.

THE COURT: Well, I don't know how material it is in this case to go into that.

MR. McLAREN: I will withdraw that question for the present, then, if the Court please.

Q Now, refreshing your recollection, Mr. Good, do you recollect anything about the transactions of one M. P. McCoy during the summer of 1909 while he was acting as special disbursing agent.

A I do, yes sir.

Q State whether or not you made any investigation of charges of irregularities against him in his work with the government?

A I did.

Q What were those investigations, Mr. Good?

A Why, I investigated his—I tried to investigate his work on the Colville Reservation here in 1909, the summer of 1909; also some work that he did in Montana in 1908 on different surveys that he was supposed to be checking up.

Q To refresh your memory, Mr. Good, I will ask you to examine some of these checks which are marked Plaintiff's Ex-

hibit "A" and state whether or not you made any investigations to determine whether the payees in those checks or the names as shown as payees in those checks were fictitious or otherwise?

MR. McCORD: I object to that as incompetent, irrelevant and immaterial.

MR. McLAREN: I expect to prove by this witness that these persons were fictitious persons, the names were fictitious.

THE COURT: The objection is overruled.

Q Did you make such investigation, Mr. Good?

A I did as to the supposed employees working for Mr. McCoy during the year 1909 and 1908.

Q Was that investigation made at the places where these parties' residences were supposed to be?

MR. McCORD: I object to that as leading, irrelevant, incompetent and immaterial.

MR. McLAREN: I will change the form of question, Mr. McCord. It doesn't make any difference.

MR. McCORD: I don't care about the leading part of it. I object to it as incompetent, irrelevant and immaterial.

Q Did you find any such person as J. D. King?

A I did not.

MR. McCORD: Ask him where he examined or something of that kind. Such a question without stating where is too indefinite.

THE COURT: Well, he can't tell it all at once. He has got to have a beginning somewhere. I overrule the objection.

MR. McCORD: Exception.

THE WITNESS: In the first place I called for the—on the Commissioner of the General Land Office for Mr. McCoy's monthly and quarterly statements of his accounts to ascertain the name—

MR. McCORD: What is that?

THE WITNESS: To ascertain the names of the people that he was supposed to have working for him.

MR. McCORD: I move to strike out that, Your Honor,

as not the best evidence. He gathered certain information from certain public records in Washington.

MR. MCLAREN: That is simply preliminary and leading up to the investigation.

THE COURT: Objection overruled. Motion to strike out denied.

MR. McCORD: Exception.

Q Proceed, Mr. Good.

A And those statements, those quarterly statements, also vouchers, set out the different men that he was supposed to have had working for him.

MR. McCORD: I move to strike out, Your Honor, from the witness' testimony the statement as to what certain public records in Washington showed as not the best evidence.

MR. MCLAREN: I have offered those same vouchers and counsel objected to them. I don't think it lies now in him to object as secondary evidence.

MR. McCORD: It is not secondary evidence.

THE COURT: The motion to strike out is denied. The objection is overruled.

MR. McCORD: The Court will allow me an exception.

THE COURT: Exception allowed.

Q Proceed, Mr. Good.

A And to secure the addresses of the different employees and in that way I had some grounds to work on to look up these people. This man King was supposed to be from Great Falls.

MR. McCORD: I move to strike out that, Your Honor, where he was supposed to be from, as wholly immaterial, irrelevant and incompetent.

THE COURT: You need not repeat that every time. I will let you have a bill of exceptions and have it all in. I am going to let him testify about his whole investigation.

MR. McCORD: Understand I have an exception to all. I don't desire to impede the progress of the trial.

THE COURT: You may have your exception.

Q Go ahead, Mr. Good.

A Well, I found out the addresses of these different employees and the names of the employees as set out in Mr. McCoy's vouchers and checks and so forth, and I went to the different places where these different addresses were given to try to locate these different employees, different places in Montana, Great Falls, Benton, Culbertson, and Glasgow, I made a thorough search for these different employees and was unable to find any such men as set out in his accounts and his statement of expenditures and also as to the checks that were issued in payment for services and labor.

A JUROR: Will you speak a little louder.

MR. McLAREN: The juror didn't get the last part of your answer. Will you repeat the last portion of your answer, that you didn't find any of the persons named?

A Yes sir, as set out in checks and vouchers that he rendered a statement—he rendered a statement every month of his expenditures and he set out in all those monthly statements the employees that he had under him and for supplies and so forth that he purchased during that month, that is where I ascertained the names of the different employees and amount of supplies that he bought from different concerns, got the full statement of the Commissioner of the General Land Office as to his expenditures for each and every month.

Q As a result of that investigation did you find all of those persons named as payees in the checks, Exhibit "A," were real or fictitious persons?

A I was unable to locate a single one.

Q You examined in each case, did you, the locality where they were supposed to have been employed?

A I did for the years 1908 and 1909.

Q About what length of time did your investigation consume, Mr. Good?

A About six weeks all told.

**CROSS-EXAMINATION**

By MR. McCORD:

Q Have you gone through all of these checks in Exhibit "A" recently?

A I have not, no sir.

Q You don't know whether those are the checks that you were investigating five or six years ago or not, do you?

A When I was here in September or August, 1909, I secured from the National Bank of Commerce quite a bunch of checks that they had on hand that they had not transmitted to the commissioner of the General Land Office, to the treasury department at that time, they were the only checks that I ever saw in connection with Mr. McCoy's account; the others had been sent to Washington.

Q Do you know what checks you ever saw; are those the checks; are you able to tell which ones you got from the National Bank of Commerce here in September, 1909?

A Well, I had all the checks that were cashed, and if I remember right, for July and August at that time.

Q July and August at that time?

A Yes sir, the bank turned them over to me and I had them in my possession for several days.

Q Now, all these checks that have been introduced here and what is known as Exhibit "A," covering this entire length of time, did you ever go over these checks and examine them?

A Not today, no sir.

Q What?

A Not today, no.

Q Well, when did you examine them?

A I have not examined any of these checks; I haven't seen them before until I just came in here except if any checks are included here that I saw while I was here in 1909.

Q As a matter of fact the only checks that you have ever seen in this McCoy transaction were the few checks in the months of July and August, 1909, that you got from the National Bank of Commerce?

A That is all, yes sir, at that time.

Q Now, as a matter of fact you only got the checks for the last month in 1909, did you not?

A I think it covered July and August, I think they made a quarterly return to the—

Q As a matter of fact don't you know that they make a return or did make a return monthly and did send in the checks monthly?

A They might have; however, since you brought the matter up they didn't make a return at that time for July and I got the checks for July and August, for two months at that time.

Q You never examined any other checks except those?

A No, I wasn't in a position to; they were in Washington.

Q And you never examined them in Washington either, did you?

A No sir.

Q You never saw them?

A No sir.

Q And whether or not the checks referred to, the fictitious people referred to in these checks were the ones that you examined over in Montana or not you don't know?

A No.

Q Except that they are similar names?

A I never saw the checks before.

Q You don't remember those names, King and all that bunch of twenty-five or thirty names, do you?

A Well, going through here I could recall these names, checking up my work that I went through a year and a half ago or two years ago.

Q Take the examination of the surveys in Montana where the men were supposed to be employed, the parties living, some of them at Glasgow you said?

A Yes sir.

Q What sort of an investigation did you make?

A Well, as I said I secured from the office in Washington his original—

Q I understand you got the names in Washington?

A Got his original vouchers and his—

Q Got the names and the purported addresses and you went out to investigate. What did you find?

A I had the original pay-rolls signed by these different parties and also the vouchers that I secured, were sent to me.

Q What I want to get at is what investigation did you make. Did you go to Great Falls and investigate there?

A Tried to locate these parties, yes sir.

Q What sort of an investigation did you make? How extensive? What did you do?

A Well, I went to Great Falls for instance.

Q Well, I want to know what you—

A Ascertained from the postmaster, directory, any way possible to locate a certain man that I was after that was supposed to live at Great Falls. For instance I went to the County Surveyor's office, took it for granted that these men were surveyors, to ascertain whether there was such a surveyor living in that part of the country.

Q You didn't find any of them?

A Couldn't locate a single man.

Q And as a matter of fact after you made that investigation as to one or two men you reached the conclusion that they were all forgeries, didn't you?

A I beg your pardon?

Q Did you run down each man in the same way?

A I did.

Q I will ask you if it was upon your investigation that the government reached the conclusion that this particular package of checks, aggregating \$15,000, were fraudulent?

A Why, I made a report on the case and also what I gathered from the man that wrote the checks, Mr. McCoy admitted they were all forgeries to me.

Q In other words, your report was based on what Mr. McCoy told you and your investigation in a cursory way?

A And what I heard in court in Tacoma when he was found guilty.

Q When you found Mr. McCoy was guilty of perpetrating frauds you didn't spend very much time in tracing it down, did you?

A It was not necessary.

Q That is what I say.

A He admitted everything.

Q You knew the man was guilty, he admitted he was guilty, he admitted that he had robbed the government and proved unfaithful to his trust and you were not busy in making any further investigations, were you?

A No after that.

Q And as a matter of fact the list of checks made up there now is based entirely upon the testimony of Mr. McCoy, isn't it, that is except for probably the months of July and August, 1909?

A Why, I am sure I don't know; I don't quite understand what you are trying to get at.

Q What I am trying to get at is this: I say in determining the fraudulent checks that had been issued the government acted upon your report you say and you acted on Mr. McCoy's statement, didn't you, for the most part?

A To a certain extent, yes; I couldn't ascertain who these men were and he admitted that there weren't such men and the checks were all fraudulent and—

Q And when he admitted that, you were ready to assume that it was all true, weren't you?

A Well, as far as the investigation that I made, I found out that to be a fact.

Q Well, you made the investigation before you had him arrested?

A I did, yes sir.

Q But you didn't make it covering his entire work for the

two or three years; you only had him indicted or had him charged with the embezzlement of a few sums, did you not?

A He was indicted here for depredations that took place here in Washington, yes.

Q I understand that, but it was only one particular item, wasn't it, or two?

MR. McLAREN: That is objected to as not calling for the best evidence.

Q I ask if you know.

A Covering his shortages here for the past year, that is what he was indicted for here.

Q You have not seen the indictment yourself, have you?

A I did see it.

Q You don't remember that?

A No.

Q You couldn't tell. That would not be the best evidence.

A That is a matter of record.

Q What I am getting at is this: when you went over into northern Montana, you were the fellow that got onto his scheme, weren't you, Mr. Good?

A Yes sir.

Q A couple of men up in northern Montana somewhere got into a row over a homestead and you went up there as special agent to investigate it, didn't you?

A No, I beg your pardon.

THE COURT: It is now time to adjourn. We will adjourn until tomorrow morning at ten o'clock. Gentlemen of the jury, until that time you will be permitted to separate. You are instructed that while you are out of court you must not talk about this case or any subject matter connected with it. You will not discuss it between yourselves or any one or listen to what anybody may say about the case out of court. You are also especially instructed to have no conversation on

any subject whatever either with the witnesses or attorneys or parties interested.

(Further proceedings continued until 10 o'clock A. M., March 13, 1912.)

March 13, 1912, 10 o'clock A. M.

All present and the jury in the box.

Proceedings continued as follows:

W. G. GOOD, on the stand.

### CROSS-EXAMINATION (Resumed)

By MR. McCORD:

Q Mr. Good, you stated that you made certain investigations over in Montana as to the reality of these various payees named in the checks; did you make any investigation in any other state as to those that were issued fraudulently, covering surveys, purported surveys, in the state of Washington or the state of Idaho?

A I only took up those in Montana and the ones here he was supposed to have been working on at the time that he was arrested.

### RE-DIRECT EXAMINATION

By MR. McLAREN:

Q Mr. Good, you say you investigated his reports at Colville on the Colville Reservation where he was supposed to be working at the time he was arrested?

A Yes sir.

Q Where was Mr. McCoy staying at the time he was supposed to be working at Colville?

A Right here in this city.

Q How long had he been staying here?

A All that summer.

Q The summer of 1909?

A Yes sir.

Q Now, you testified on cross-examination of Mr. McCord,

that you made an examination over in Montana and then later interviewed Mr. McCoy himself in Seattle. I want to ask you, Mr. Good, if you made an investigation regarding Mr. McCoy's work and reports at Great Falls, Montana?

A I did so far as trying to locate the employees that he was supposed to have working for him.

Q Did you make an investigation there to find J. D. King?

A I did; I think his address was Great Falls.

Q Did you find him?

A No sir.

Q Did you find F. M. Clark?

A I did not.

Q A. J. Whitney

A I did not.

Q D. H. Sullivan?

A I did not.

Q S. F. Cady?

A I did not.

Q All of those names were supposed to be the names of employees at or near Great Falls, were they not?

A Their postoffice address was given as Great Falls.

Q On the voucher that you spoke about?

A Yes sir.

Q Now, did you make a similar investigation at Culbertson, Montana?

A I did as to two or three parties there.

Q You mean as to the parties supposed to be employed at that place?

A Yes sir.

Q Did you find there any George D. Cook?

A I did not.

Q Or F. M. McCulley?

A I did not.

Q Did you make a similar investigation at Benton or Fort Benton, Montana?

A I did as to one man I think there.

Q What man was that? To refresh your memory was that H. M. Benson?

A That is the name, yes sir.

Q Did you find H. M. Benson?

A I did not.

Q What effort did you make to find any such person?

A I made every effort possible to locate a man in a place of that kind by making inquiries from business men, the postmaster and so forth, men that have lived there for years that I knew of and supposed to know every one in the community, made a diligent search.

Q Now, at the Colville Reservation in the State of Washington, Mr. Good, you say you made an investigation of Mr. McCoy's supposed work and employees?

A I did.

Q Did you investigate to learn whether one A. C. Jenkins was a real or fictitious person at Colville or near there?

A I did.

Q Did you find any such person as A. C. Jenkins?

A I couldn't locate him at all.

Q You used the same methods of investigation there as you have described already?

A Yes sir.

Q What did you find as the result of these investigations as to whether or not Mr. McCoy himself had been on these public surveys doing the work that was indicated in his reports?

A I couldn't learn that he had been on the ground himself at all.

Q You couldn't learn that he had been on the ground at all?

A No sir.

Q And it was after making an investigation, as you have just testified to that you then came over and interviewed Mr. McCoy himself?

A Yes sir; all my evidence was negative, I couldn't locate a single man that was supposed to be employed by Mr. McCoy,

I couldn't learn where he had been on the ground himself and I simply had to confront Mr. McCoy in relation to it.

(Witness excused.)

MR. McCORD: I will have an opportunity, Your Honor, as I understand the stipulation, including the Court, to file an exception and have a bill of exceptions to all of this testimony or such parts of it as I want in the bill of exceptions.

THE COURT: I will allow that.

MR. McLAREN: I offer in evidence as Plaintiff's Exhibit "H" a copy of the indictment in the case of the United States of America vs. M. P. McCoy, returned by the Grand Jury on the July term of 1909.

MR. McCORD: September 17th.

MR. McLAREN: Returned September 17th, 1909, to which the defendant pleaded guilty on the 28th of September. There is no objection by counsel.

THE COURT: It will be admitted.

Copy of indictment referred to admitted in evidence and marked Plaintiff's Exhibit "H".

MR. McLAREN: I offer in evidence as Plaintiff's Exhibit "I", certified copy—

(Paper handed to counsel for defendant.)

MR. McCORD: I object to the offer on the ground that it is irrelevant, incompetent and immaterial.

I further object to it, Your Honor, upon the ground that the purported letter, directed to the cashier of the National Bank of Commerce, of Seattle, Washington, dated February 7th, 1903, purports to carry with it certain instructions and a circular containing the regulations issued by the treasury department under date of December 7th, 1906. It shows upon its face that the letter appointing the National Bank of Commerce a United States depository is dated February 7th, 1903. Now, they attach to the letter dated February 7th, 1903, a list of regulations dated December 7th, 1906, made three years after the letter, which purports to carry with it the transmission of the departmental regulations. I object to it upon the further

ground that in 1903 the National Bank of Commerce, while there was a National Bank of Commerce in existence at that time, in 1906 the National Bank of Commerce that was then in existence went out of business by a consolidation with the Washington National Bank under the name of the National Bank of Commerce, so that this letter is objectionable for the two reasons: First, that there ought not to be permitted to go to this jury any departmental regulations bearing date after the letter of transmission establishing the depository, unless it is shown that they were sent after they were printed. There is no presumption that because a United States depository was created in 1903 regulations bearing date three or four years later were ever mailed to them; and besides, as I say, the National Bank of Commerce, to whom this letter was addressed, happens to have the same name that the present National Bank of Commerce has, but the date of the organization of this bank is of a later date, established in 1906, and the burden is on the plaintiff to prove that the bank that was established in 1906, or the one that they are suing, when it was established. I object to it as irrelevant, incompetent and immaterial, not the best evidence, hearsay, and wholly immaterial to any of the issues in this case, and extremely prejudicial to the defendant in this action if permitted to be introduced in evidence.

MR. McLAREN: If the Court please, the fact that the original National Bank of Commerce may have seen fit to consolidate itself with some other bank, but preserved the same name, admitting, as counsel says, that it was a national bank throughout that period, including the period of this letter, ought not to have any bearing upon the admissibility of this letter. It might be possibly a defense, but those facts are not in evidence yet if they are admissible at all. Now, as regards the circulars which are attached to this letter, it is true there does appear a discrepancy in the date, the letter bearing date, February 7th, 1903, and the circular, December 7th, 1906. These circulars do, however, cite that they are intended to in-

clude the previous circulars of 1897 and April 17th, 1899, respectively. Does the Court wish to examine the letters?

THE COURT: Yes.

(Papers handed to the Court.)

THE COURT: To introduce this circular you will have to have some proof that it was received or at least transmitted to the bank.

MR. McCORD: I add to my objection, furthermore, that there is no proof of the mailing of the letter.

MR. McLAREN: I would like to make the further suggestion, Your Honor, that public regulations of the department, such as those, would be taken judicial notice of in any event as being a departmental regulation issued under the executive authority of the departments of government.

MR. McCORD: That doesn't make law. It is not binding on the defendant in a case like this.

(Further Discussion.)

THE COURT: The Court is required to take judicial notice of regulations made by the departments of the Government authorized by law, and so far as those regulations conform to the law and are not contrary to the law and do not invade rights that exist under the law, they are valid regulations and have the force of law. It may be in determining the law of this case that the Court will have to consider the question whether there is anything in these regulations that are not binding by reason of attempted exercise of unauthorized power or deprivation of legal rights. Under the statute public funds are required to be kept on deposit with the treasurer of the United States or an assistant treasurer, but in places where there is no treasurer or assistant treasurer, the secretary of the treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of any public money in any other public depository or in writing authorize the same to be kept in any other manner and under such rules and regulations as he may deem effectual to facilitate payments to public creditors. That is a part of the statute, Sec-

tion 3620, of the United States Revised Statutes. This defendant is not the treasurer or an assistant treasurer and could only receive and hold and disburse public money by virtue of this last clause of Section 3620, and would be bound to observe the lawful regulations made by the Secretary of the Treasury.

MR. McCORD: If it has the force and effect of law, Your Honor, then it is not admissible in evidence, but it is the duty of the Court to instruct the jury what the law is, treating that as a part of the law. I object to the entry on that additional ground, that the Court will not send to the jury statutes of law, but tell the jury what the law is when the case is submitted. A certified copy of the statute is not admissible in evidence. It is for the Court.

MR. McLAREN: I make this suggestion upon that point: That the sending of that certified copy of the regulations could not be of any prejudice to either party. On the other hand, a failure to do so might result, if counsel's first position is correct, in an error in the record in the trial of this case. I think it would obviate a possible mistrial if it is permitted to go in.

THE COURT: I consider these circulars as matters for the information of the Court only. You may read into the record the letter dated February 7th, 1903, and this paper will not be submitted to the jury as an exhibit in the case. Simply that letter may be read in.

MR. McCORD: I object to that, Your Honor, because there is nothing in the certificate to show that the letter was ever mailed. I don't know that the government stands in any better position than an individual. Proof of the mailing of the letter would be necessary by somebody.

THE COURT: I will overrule the objection.

MR. McCORD: My objection goes to the ruling of the Court on the question of these departmental regulations.

THE COURT: Yes.

MR. McCORD: That is all of the objections that I have made goes to the whole matter, Your Honor.

THE COURT: Exception allowed.

MR. McLAREN: I wish to read now to the jury the letter from the treasury department of Washington dated February 7th, 1903: "Cashier, National Bank of Commerce, Seattle, Washington. Sir: In compliance with the wish, orally expressed by Mr. H. C. Wallace, a director, the National Bank of Commerce of Seattle, Washington, now a depositary of public moneys for temporary service, is hereby made a depositary for regular purposes, except receipts and customs, and specially designated under the provisions of Section 3620, Revised Statutes of the United States, for the reception, safe keeping and disbursement, according to law, of the funds advanced to disbursing officers of the Department of the Interior. The receiver of public moneys at North Yakima and Waterville, Washington, have been instructed to deposit their receipts and keep their disbursing accounts with your bank. The additional blanks which will be needed by you on account of this designation have been sent to you and your attention is invited to the instructions printed thereon as well as to the circular instructions herewith enclosed. Your bank is hereby authorized to hold a fixed balance equal to the par value of its secured bonds, viz., \$300,000, and you will remit to an assistant treasurer of the United States each day from the balance standing to the credit of the Treasurer of the United States for deposit on account of 'Transfer of Funds' a sufficient sum to reduce your total balance to said amount of \$300,000. Respectfully, L. M. Shaw, Secretary." And attached to it is the seal of the Department.

I now offer in evidence as Plaintiff's Exhibit "J" certified copies of certain letters of instruction from the Department of the Interior, General Land Office, Washington, to M. P. McCoy, Examiner, having particular reference to the page that I have turned down in the margin.

MR. McCORD: I object to the offer as irrelevant, incompetent and immaterial; on the further ground that there is no proof that the copies of the letters purporting to be offered here were ever mailed to Mr. McCoy as examiner, and so far as this

controversy is concerned between the Government and the defendant bank, any communications or any letters passing between the Government and Mr. McCoy would be purely hearsay and outside of the record, and not the best evidence.

MR. McLAREN: The Court will recollect that the deposition of Mr. McCoy showed that he had burned and destroyed all of his letters of instruction, and upon an attempt being made to have him testify in substance what they were, this very objection was made, that the files in Washington would be the next best evidence. I now offer this in evidence particularly, and only the part that I have turned down in the margin for this purpose, if I may be permitted to state the substance of that: That the testimony shows that during the summer of 1909 Mr. McCoy was stationed here at Seattle all the time, although he was supposed to be engaged in the examination of the public land surveys in the eastern part of this state, and also in Montana, and the letter which I am now offering in evidence is his authority not only to go over there, but to transport his assistants over there to those points. The vouchers which I offered in evidence contain the expense accounts of these two fictitious assistants whom he did transport according to his vouchers, and for which he did get pay from Seattle over into the eastern part of this state, and I guess over in Montana as well. This is the very evidence that counsel said yesterday was the best evidence. I now offer it.

THE COURT: The obligation of this defendant was to receive, safely keep and disburse public money according to law and regulations. The bank was not required to exercise supervision over the disbursing officers or to insure the Government against embezzlement or loss of funds by misappropriation or for expending the money for improper purposes. The duty of the bank was to pay the checks that were properly drawn by an authorized person, a person authorized to draw them, and pay the money to the payees or to the order of the payees's name in the check. The bank could not know and was not required to know, whether the payments were proper pay-

ments. It had to know that the payments were made as authorized by the checks. I think you are loading this case up with unnecessary matter in endeavoring to prove that these payments were fraudulent to the extent of being drawn for services that were not rendered or supplies that were not furnished. The bank did not have to inquire about them and was not in a position to know. The bank was in a position to know that the payees who presented the checks or got the money or indorsed them were properly identified.

MR. McLAREN: I call the Court's attention to the fact that one of the defenses set up was that the Government did receive value received for these checks, although they were fraudulently issued.

THE COURT: Well, when you reach that the Court will have to rule on it, but in making your case in chief you are not required to anticipate that defense. I will sustain the objection on the ground that this document is irrelevant. It is not a necessary part of the proof that the Government is required to introduce. I think it is the defendant's case in chief.

MR. McLAREN: Allow us an exception.

THE COURT: Exception allowed.

MR. McLAREN: In order to facilitate matters, if the Court please, I now offer to prove by one other witness what the fixed, settled policy and practice of the Department of the Interior was as to their method of examining and checking up the surveys that were made from time to time of the Government's public lands. It may be that the Court will rule that this is anticipating the defense, and if so I make this offer in this way; if not I will put my witness on the stand.

THE COURT: I think it is anticipating the defense, and it is out of order at this time.

MR. McLAREN: I simply want to protect myself against being cut off by rebuttal.

THE COURT: Yes.

MR. McLAREN: Plaintiff rests.

## PLAINTIFF RESTED

MR. McCORD: I now at this time, Your Honor, move for a non-suit and dismissal of this action for the reason that the plaintiff has wholly failed to establish the allegations of the complaint and has failed to establish any cause of action that would be binding upon the defendant, and the condition of the evidence is such that if a verdict were rendered in favor of the plaintiff it would be the duty of the Court to set it aside.

(Argument by Mr. McCord.)

THE COURT: I will not decide this motion before two o'clock. Gentlemen of the jury, you may be at ease until two o'clock. I am not excluding you from hearing this if you want to hear it, but you may be excused from attendance until two o'clock if you want to go. The instructions I have given you at other times of adjournment are to be remembered by you and to be heeded by you as now repeated.

(The jury retired.)

(Further argument by respective counsel.)

THE COURT: I want to take time to read some of these authorities; the case in 214 United States.

(Respective counsel cited authorities to the Court.)

THE COURT: As the matter rests in my mind now, it seems to me like a difficult point to get over in this case would be that the checks were not returned. The right to recourse against the banks through which these checks came to the defendant bank would, according to ordinary banking rules, depend upon the return of the endorsed paper, and the Government is held to observe the business rules which obtain with business men in business transactions, and the Government is not allowed to assert a right while committing a wrong. If it was wrong to withhold these checks, it is not right to make the defendant bank pay.

(Recess until two o'clock P. M. same day.)

March 13, 1912, 2 o'clock P. M. All present and the jury in the box. Proceedings continued as follows:

THE COURT: I want to see those checks.

(Papers handed to the Court.)

THE COURT: I want the letter of instructions that accompanied these circulars that was received this morning.

(Papers handed to the Court.)

THE COURT: How did the money get into the bank? Was the money deposited there to the credit of Mr. McCoy or did he receive drafts and deposit the drafts?

MR. McLAREN: It was sent directly to the bank, Your Honor.

MR. McCORD: Deposited to the credit of M. P. McCoy as special examiner, or examiner of surveys and special disbursing agent, I think.

MR. McLAREN: (Hanging papers to the Court.) Those are certified copies of the several warrants that were sent to the bank. They are not introduced in evidence. I neglected calling Your Honor's attention to the fact that the checks for the year 1909, none of them contain in the margin any items as to the purpose for which they were drawn, which is contrary to the regulations submitted to you, and which provide that the bank shall refuse payment of checks unless it complies with that.

THE COURT: How did these checks get into the possession of the United States?

MR. McLAREN: The custom between the United States and the bank was this: that after the checks were turned into the bank and canceled for payment they were sent in to the Department at Washington every month or every quarter, as the case might be, I think every quarter, and transmitted along with a statement from the bank to the Department, and upon the representation of those canceled checks and the statements accompanying them from the bank the settlement was made from time to time between the Department and the bank. As to the checks for July and August, 1909, you will recollect that the witness testified they were still in the possession of the bank at the time the investigator spoke to the bank officially

about it when he was making his investigation before Mr. McCoy was arrested.

THE COURT: All those checks returned or sent to the accounting department accompanying statements of the account, they show on their face that they did not comply with the regulations, not having indorsed or indicated thereon the purpose for which the check was issued.

MR. McLAREN: That is true, Your Honor.

THE COURT: That would be notice to the Government, if the Government accepted those returns without question or within a reasonable time, it would preclude the Government, I think, from denying the right of the bank to pay the check on that ground for a non-compliance with that regulation. So far as the government had notice or can be presumed to have had notice of what the transactions really were, it is like any other party dealing with commercial paper to observe the laws that fix and determine the rights and liabilities of the parties in handling commercial paper. When a depositor receives a statement of his account in the bank, accompanied by checks that have been paid, and he fails to give notice promptly of any checks that are spurious or payment improperly made, it becomes an account stated, it cuts off any dispute about those matters after a lapse of a reasonable time to show up errors, discrepancies.

MR. McLAREN: Might I suggest that that doctrine could not apply to the Government as a depositor, except predicated upon this theory: That the oversight or neglect of some subordinate in the department at Washington could have the effect of nullifying the printed regulations issued by the Secretary of the Treasury?

THE COURT: The case in 214 United States decides one point, and that is that the rule requiring prompt notice to be given of the invalidity of commercial paper is an exception to a general rule, the general rule being that where money is paid by mutual mistake that the mistake can be corrected and the matter adjusted according to the rights of the parties.

Now the exception that is made in the law is where notice of a mistake is not promptly given and after a lapse of reasonable time, if no notice is given, the party who has made the mistake is protected against bringing up the matter to be readjusted.

Now, the Supreme Court decided that that exception does not apply except in those matters where the party who should give the notice is in a position to have knowledge of the mistake. It does not apply as against the Government when checks are paid on fraudulent indorsement of payees, because the Government does not know the payees, does not know their signatures, is not in a position to have the information so as to give notice of a mistake of that kind; therefore, the rule does not apply. The argument to be drawn from that is that, in accordance with other decisions of the Supreme Court of the United States, the Government is bound by the business rules that apply to the handling of commercial paper. As said by Judge Miller, the Government itself is as much interested, if not more interested, than anybody else, in the value of confidence in handling commercial paper, and for that reason it is as much bound as private individuals are to the reasonable rules of business that are prescribed and followed for the protection of people who repose confidence in handling commercial paper. The defendant was not obligated to pay any of these checks except on presentation at its banking house in Seattle by the payee, and upon being satisfied of his identity, but in accordance with commercial usage, it acted with reasonable business prudence in taking these checks, accompanied by an endorsement which guaranteed or warranted the genuineness of the signature of the payee; I mean taking these checks from another bank; and having done so it is entitled to be treated fairly in the matter of protecting its rightful recourse against the prior indorsers. I think essential to that right was the return of the checks or a tender of them. If I am not greatly mistaken in my understanding of banking business and the rules of law, this defendant upon being informed that

the payees named in these checks were fictitious persons, and the endorsements of their names on the checks were forgeries, and that the checks were in the custody of the United States District Attorney, and that permission would be given to inspect them and take copies therefrom, would not on receipt of that notice or that kind of information have any legal ground to go to another bank from which the check had been received with guarantee and say, "Here, that guarantee of yours has caused me to lose money and I require you to pay back the money that I paid on this check"; I don't believe the defendant bank could go to another bank and make a demand of that kind on that kind of showing or that state of facts. It would have the right to take the check and throw it down on the counter and require the money to be refunded on it. I will grant the motion for a non-suit.

MR. McLAREN: Just a moment, if the Court please. The state of facts which Your Honor suggests I think would not be applicable to the checks for the months of July and August, the last two months issue of the checks, for the reason that as testified to by Inspector Good, those checks were still in the possession of the National Bank of Commerce at the time he made his investigation, and at that time he told the bank the facts and the transactions relative to Mr. McCoy.

MR. McCORD: He did not so testify. He said he went there and asked for the checks and they were given to him by the bank.

MR. McLAREN: Yes, for the months of July and August.

MR. McCORD: And then they were forwarded on to Washington.

THE COURT: Did he take them up?

MR. McLAREN: No, he didn't.

MR. McCORD: They were forwarded to Washington, just the same as the other checks.

THE COURT: They were forwarded before any—

MR. McCORD: Before any demand was made, according to the evidence, on the 5th of March.

THE COURT: They were in the possession of the Government when this suit was commenced?

MR. McCORD: Yes.

MR. McLAREN: Yes, they were when the suit was commenced, but they were in the possession of the bank when the McCoy transactions were first brought to their attention by the investigation of Mr. Good. This point was not suggested on demurrer to the complaint, and I would therefore ask the permission of the Court to reopen the case for this purpose and for this purpose only. I would like to have it reopened for the purpose of offering to prove that Mr. Good at the time he was in the bank did inform the banking officials as to the McCoy transactions, and for the further purpose of offering in evidence the notice which was sent to the bank before suit was commenced, in which we offered to permit them to inspect all of these checks at the office of the United States Attorney. That offer may affect the state of the record on appeal, while it may not affect Your Honor's decision.

THE COURT: I will allow you to reopen the case for that purpose.

W. G. GOOD, being recalled as a witness on behalf of the plaintiff, testified as follows:

## DIRECT EXAMINATION

BY MR. McLAREN:

Q Mr. Good, you have testified already that you called at the National Bank of Commerce of Seattle at the time you were making the investigation regarding Mr. McCoy. Do you recollect which ones of these checks now in evidence, if any, the bank still had in its possession at that time?

A They had the checks that were issued for July and August.

Q Of 1909?

A Two months, yes sir.

Q What statements, if any, did you make to the officials

of the bank at that time regarding those checks, regarding Mr. McCoy's transactions?

A I secured the checks—

MR. McCORD: I object to that as to any statements he made so far as their being binding upon this defendant is concerned. This witness was trying to get evidence against Mr. McCoy. He was not authorized by the United States to bind the United States by any representations he might have made.

MR. McLAREN: I am proving notice to the bank, Your Honor.

THE COURT: I will overrule the objection.

MR. McCORD: Exception.

A (Continuing.) Well, in the first place, of course when I approached the bank I told them what my purpose was and what I was there for, that I was investigating Mr. McCoy's business methods, and if I remember right, I had a letter to the bank by Mr. Todd I think, issued by Mr. Todd; however, they were very frank and secured these checks for July and August, and I had them in my possession for three or four days.

Q And you returned them to the bank?

A I returned them to the bank and after—I think it was after Mr. McCoy pled guilty and I advised them of what took place in connection with Mr. McCoy and that those checks were fraudulent and that he admitted it, and so forth.

Q And you told the banking officers, did you, that the checks were fraudulent?

A Oh, yes.

Q And in what way they were fraudulent?

A Yes sir, I gave them the history of the whole case and the transactions in connection with my investigation at that time.

Q You left the checks in their possession?

A Oh yes, I returned them.

## CROSS-EXAMINATION

BY MR. McCORD:

Q Whom did you have your conversation with?

A Now, I can't recall the gentleman's name; there was two men, one man had charge of the Government's disbursing accounts, and then there was a young man there, either assistant cashier—I can't recall his name now.

Q It was not an officer of the bank; you don't know whether it was or not?

A He had some title, assistant cashier I think he was.  
(Witness excused.)

MR. McLAREN: I offer in evidence as Plaintiff's Exhibit "K" a—

(Paper handed to Mr. McCord.)

MR. McLAREN: I offer in evidence as Plaintiff's Exhibit "K", a certain letter dated March 4, 1910, addressed to the National Bank of Commerce, by the United States Attorney of Seattle, accompanied by a list of all the checks in dispute, which letter offers the bank permission to examine the checks at any time by its officials or by its attorneys.

MR. McCORD: I object to it as irrelevant, incompetent and immaterial.

MR. McLAREN: You will find the return of the Marshall attached to the letter, showing service on the bank.

THE COURT: I overrule the objection. It may be admitted.

Letter referred to admitted in evidence and marked Plaintiff's Exhibit "K".

C. W. McKERCHER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

BY MR. McLAREN:

Q Your name is C. W. McKercher?

A It is.

Q You are a clerk in the United States Attorney's office?

A Yes sir.

Q Do you recollect any official or employee of the National Bank of Commerce calling upon you in response to this letter which I hand you, Exhibit "K"?

A I don't know that it was in response to that letter; Mr. Brownell, Chief Clerk at the bank, called.

Q For what purpose did he call?

MR. McCORD: I object to that as incompetent, irrelevant, immaterial and hearsay. The clerk of the bank would not be able to bind this bank.

THE COURT: I overrule the objection.

A He called to see the indorsements on the checks.

Q The indorsements on these checks in dispute in this case?

A Yes sir.

Q Did you show him those checks?

A I did.

Q Did you show him all of them?

A I did.

Q Do you recollect how soon after the date of that letter, March 4, 1910, this happened?

A No, I do not.

Q Would you say it was shortly afterward?

MR. McCORD: I object to that as leading.

THE COURT: Overruled.

A It was at the time that Mr. Todd was in Washington during the Ballinger-Pinchot controversy; I don't know the date of it except in that way.

MR. McCORD: That was in June, wasn't it?

THE WITNESS: I don't recall the date.

MR. McCORD: I saw Mr. Todd in Washington, that is how I happen to know.

Q Did Mr. Brownell or anybody else for the bank at that time or any other time make any demand upon you for the possession of the checks?

A He did not.

Q He made an examination of all of them?

A As many as he wished.

Q You offered him to inspect all of them?

A I did.

### CROSS EXAMINATION

BY MR. McCORD:

Q That was some several months after March 4th?

A Yes sir.

(Witness excused.)

MR. McCORD: I now renew my motion for a non-suit on the same ground, Your Honor.

THE COURT: The motion is granted.

MR. McLAREN: The Court will allow us an exception.

THE COURT: Exception allowed. The Clerk will enter an order granting a non-suit. The jurors are all excused from attendance until tomorrow morning at ten o'clock.

*In the United States Circuit Court for the Western District of Washington, Western Division.*

The United States of America,  
Western District of Washington—ss.

UNITED STATES OF AMERICA,

*Plaintiff,*

No. 1933.

vs.

M. P. MCCOY,

*Defendant.*

} INDICTMENT.

Violation of Sec. 5488 R. S.

JULY TERM A. D. 1909.

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the Western District of Washington, upon their oaths present:

That one M. P. McCoy, heretofore, to-wit: On the 31st day of March, 1909, and at various times between that date and the first day of September, 1909, in the City of Seattle, in said District, being then and there an examiner of surveys employed by the General Land Office of the United States, and as such officer being at said times and place a disbursing officer of the United States and entrusted with certain public moneys of the United States; did, by virtue of his said office and employment and while so employed and acting as such disbursing officer of the United States, receive and take into his possession certain public moneys of the United States, to-wit: the sum of Five Thousand Seven Hundred and Eighteen (\$5,718.00) Dollars, lawful money of the United States of America, then and there the property of the United States, a more particular description of which money is to the Grand Jurors unknown; and the said M. P. McCoy did then and there wilfully, unlawfully and feloniously embezzle and convert to his own use said public moneys of the United States, to-wit, the sum of Five Thousand Seven Hundred and Eighteen (\$5,718.00) Dollars, lawful money of the United States, a more particular description of which money so embezzled as aforesaid, being to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ELMER E. TODD,  
United States Attorney.

Witnesses examined before Grand Jurors: Elmer E. Todd.

Indorsed: Indictment for Violation Sec. 5488 R. S. Case No. 1933. Plaintiff's Exhibit H. United States District Court. Western Dist. of Washington. Filed March 13, 1912. A. W. Engle, Clerk.

4-207-r.

ETDB

WTP                    DEPARTMENT OF THE INTERIOR  
                          GENERAL LAND OFFICE  
                          WASHINGTON

February 28, 1912.

I hereby certify that the annexed copies of letters from this office addressed to M. P. McCoy, Examiner, are true and literal exemplifications of the official record of said letters in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

H. W. SANFORD,

(Seal of                    Recorder of the General Land Office.  
United States General

Land Office)

Plaintiff's Exhibit "J" offered but not admitted in evidence.

In Reply Please Refer to

"E"

4"WB

172408

1907

DEPARTMENT OF THE INTERIOR C L D B  
GENERAL LAND OFFICE

Washington, D. C., October 15, 1907

ADDRESS ONLY THE  
Commissioner of the General Land Office

SCHEDULE OF COLVILLE ALLOTMENTS.

Mr. M. P. McCoy,

Examiner,

Seattle, Washington.

Sir:

Your letter of October 3, 1907, is received, reporting receipt of data from Olympia, and non-receipt of instructions, which

must have reached you soon after said date. I transmit herewith a copy of all the remaining parts of the Colville schedule of Indian allotments, which have not heretofore been supplied for your use in verifying and reporting their condition.

Of the 14 townships represented, six are still unsurveyed, and in those you are not required to investigate. Three tracts are in Tp. 39, R. 33, which you have already examined, but they were not found and reported by Deputy Shelton; so it is necessary to examine their status, and report as to the necessity of a correction survey. Allotment No. 278 for E. Dupuis appears also omitted from the survey of section 34, Tp. 37, R. 33.

As you state you are not informed as to what townships have been suspended for segregation, you are now advised that a general suspending order was telegraphed to the Waterville and Spokane offices Sept. 20, 1906, affecting *all public lands* in the north or ceded part of the Colville Reserve, besides orders by letters specifying various townships.

Very respectfully,

FRED DENNETT,

Acting Commissioner.

JCP

In Reply Please Refer to

"E

WTP

208772-1907

DEPARTMENT OF THE INTERIOR C L D B  
GENERAL LAND OFFICE

Address only the Washington, December 11, 1907.  
Commissioner of the General Land office

Schedule of Indian Allotments.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

I transmit herewith, a requested in your letter dated November 24, 1907, a copy of the schedule of Indian allotments in

T. 40 N., R. 32 E., Washington, transmitted with your letter dated June 2, 1907.

Very respectfully,

FRED DENNETT,

L.J. Assistant Commissioner.

In Reply Please Refer to

E

WTP

211973-1907

DEPARTMENT OF THE INTERIOR C L D B  
GENERAL LAND OFFICE

Washington, D. C., December 13, 1907.

Address only the

Commissioner of the General Land office.

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,

Examiner of Surveys,

Seattle, Washington.

Sir:

Upon completion of the work in connection with the Indian allotments in the ceded portion of the Colville Indian Reservation, Washington, you are requested to prepare and transmit your detailed report of the examination of the survey of the standard lines in the diminished reservation, executed by Witham and Whitham, D. S., under their contract No. 635, examined by you last spring.

The returns of said survey have been pending in this office for some time and it is desired that action may be taken thereon at the earliest practicable date.

In connection with the work upon which you are now engaged, it is noted that a description of the allotments in the following unsurveyed townships has been furnished you:

Tps. 36 N., Rs. 29 and 30 E.

Tps. 35, 39 and 40 N., R. 31 E.

T. 40 N., R. 35 E.  
Tps. 35 N., Rs. 36 and 37 E.

Your present orders are not intended to cover any investigation of the allotments in these townships, as it will be the duty of the deputies who are to make the surveys therein to segregate said allotments from the public lands.

Very respectfully,

FRED DENNETT,  
L.J. Assistant Commissioner.

In Reply Please Refer to

E  
WTP  
208656-1907

DEPARTMENT OF THE INTERIOR C L D B  
GENERAL LAND OFFICE

Washington, D. C., December 19, 1907.

Address only the  
Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,  
Examiner of Surveys,  
Seattle, Washington.

Sir:—

I transmit herewith for examination as to the bona fides of the alleged settlers the applications for the survey of T. 39 N., R. 31 E. and T. 21 N., R. 9 E., Washington. The surveyor general has, by letter of even date herewith, been directed to transmit to you direct such other applications as may be received.

Very respectfully,

FRED DENNETT,  
L.J. Assistant Commissioner.

In Reply Please Refer to

W.T.P.

E

WTP

218705—1907.

DEPARTMENT OF THE INTERIOR  
GENERAL LAND OFFICE

Washington, D. C., December 26, 1907.

Address only the  
Commissioner of the General Land Office

INSTRUCTIONS TO EXAMINER OF SURVEYS

Mr. M. P. McCoy,  
Examiner of Surveys,  
Seattle, Washington.

Sir:

I transmit herewith for examination as to the bona fides  
of alleged settlers the applications for survey of T. 37 N., R. 40  
E., Washington.

Very respectfully,

L.J.

FRED DENNETT,  
Assistant Commissioner.

In Reply Please Refer To

E DEPARTMENT OF THE INTERIOR C.L.D.B.

W.T.P.

221864-1907. GENERAL LAND OFFICE

Washington, D. C., January 7, 1908.

Address only the  
Commissioner of the General Land Office  
Indian allotments: Colville Indian Reservation.

Mr. M. P. McCoy,  
Examiner of Surveys,  
Seattle, Washington.

Sir:

In reply to your letter dated December 18, 1907, relative to  
allotment No. 65, Agnes, in T. 40 N., R. 32 E., Washington, you

are advised that the proper description of said allotment is as follows: W. $\frac{1}{2}$  NW. $\frac{1}{4}$  NE. $\frac{1}{4}$  NW. $\frac{1}{4}$  section 35 and NE. $\frac{1}{4}$  NW. $\frac{1}{4}$  NW. $\frac{1}{4}$  east of Kettle River in section 35 and SW. $\frac{1}{4}$  SW. $\frac{1}{4}$  east of Kettle River in section 26, W. $\frac{1}{2}$  SE. $\frac{1}{4}$  NW. $\frac{1}{4}$  SW. $\frac{1}{4}$ , section 26 and SW. $\frac{1}{4}$  NW. $\frac{1}{4}$  SW. $\frac{1}{4}$  east of Kettle River in section 26, said township. Any other description furnished you is incorrect.

The allotment No. 11 of Leo Tonasket has been properly shown upon a supplemental plat approved March 1, 1907, and it appears that no further action is necessary in connection therewith on the part of this office, the facts contained in your letter dated June 2, 1907, relative thereto having been submitted to the Indian office with my letter dated June 15, 1907, and no further action seems to have been taken.

Very respectfully,

L.J.

FRED DENNETT,

Assistant Commissioner.

In Reply Please Refer To

DEPARTMENT OF THE INTERIOR C.L.D.B.  
E GENERAL LAND OFFICE

W.T.P.

198421-221863 Washington, D. C., January 9, 1908.  
1907

Address only the  
Commissioner of the General Land Office

Instructions to Examiner of Surveys

Mr. M. P. McCoy,  
Examiner of Surveys,  
Seattle, Washington.

Sir:

In reply to your letter dated November 6, 1907, relative to the survey of allotment No. 33, Julia Chesaw, in section 21, T. 40 N., R. 30 E., you are directed to submit your field notes of

survey to the surveyor general for transcribing and platting if you have not already done so.

Your action in proceeding with the examination of such surveys as can be reached at this season of the year, as reported in your letter dated December 18, 1907, is approved.

Upon completion thereof, you will prepare and submit your reports, after which you will proceed with the examination of bona fides.

Very respectfully,

FRED DENNETT,

L.J.

Assistant Commissioner.

In Reply Please Refer to

"E"

36199-1908

WTP

DEPARTMENT OF THE INTERIOR C L D B  
GENERAL LAND OFFICE

Washington, D. C., March 6, 1908.

Address only the  
Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,  
Examiner of Surveys,  
Seattle, Washington.

Sir:

In reply to your letter dated February 16, 1908, requesting instructions as to further work, you are hereby directed, upon receipt hereof, to proceed to western Montana and examine the *bona fides* of settlers in the following townships, the applications for the survey of which are herewith transmitted under separate cover:

## Group No. 1.

Ts. 1 N., Rs. 21 and 22 W.

T. 2 N., R. 19 W.

Tps. 3 and 4 N., R. 21 W.

Tps. 1 S., Rs. 21 and 22 W.

Tps. 2 and 3 S., R. 22 W.

## Group No. 2.

T. 26 N., R. 22 W.

T. 29 N., R. 18 W.

Tps. 31 N., Rs. 20 and 24 W.

Tps. 32 N., Rs. 20, 21, 22 and 28 W.

Tps. 33 and 34 N., R. 27 W.

## Group 3.

Tps. 25 N., Rs. 33 and 34 W.

A map of Montana and a supply of blanks for reports are herewith transmitted.

You will take with you your surveying outfit for use in case it should be deemed expedient to later assign to you the field examination of certain surveys in Montana.

Very respectfully,

FRED DENNETT,

J.R.A.

Commissioner.

In Reply Please Refer To

"E" WTP

48326 53824

54781 57436

59454

1908.

DEPARTMENT OF THE INTERIOR CL D B  
GENERAL LAND OFFICE

Washington, D. C., March 31, 1908.

Address only the  
Commissioner of the General Land Office.

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,  
Examiner of Surveys,  
Missoula, Montana.

Sir:

In reply to your letter dated March 17, 1908, you are requested to return to the Surveyor General for Washington all data in your hands relating to surveys in his district and to advise him to hold the same for further investigation.

In addition to the work heretofore assigned you in Montana, you are directed to examine the *bona fides* of applicants for the survey of the following townships in Montana, the petitions therefor being herewith transmitted, viz.:

T. 37 N., R. 2 W., T. 28 E., R. 19 E., T. 37 N., R. 21 E., T. 29 N., R. 36 E., Ts. 30N., Rs. 33 and 34 E., T. 25 N., R. 33 E., and T. 26 N., R. 42 E.

In connection therewith you are directed to obtain the necessary data and examine the survey executed by Fred I. Hubbard, D. S., under his contract No. 510, and, if data is obtained from the surveyor General, that by Parkinson and Douglas, D. S., under their contract No. 517.

Very respectfully,

FRED DENNETT,

J.R.A.

Commissioner.

In Reply Please Refer to

E DEPARTMENT OF THE INTERIOR C.L.D.B.  
DB. GENERAL LAND OFFICE

Washington, D. C., April 14, 1908.

Address only the  
Commissioner of the General Land office.

Mr. M. P. McCoy,  
Examiner of Surveys,  
Helena, Montana.

Sir:

I have your letter of the 8th instant in which you ask to be allowed to continue examinations in the State of Wash-

ton, as your wife cannot live in the high altitudes of Montana where you are at present assigned. You fear that your work has not been satisfactory to this office.

In reply you are informed that your services in the State of Washington have been very acceptable and no fault is found with the character of your work.

Your assignment to Montana was owing solely to the necessities of the service, and in the interest of good administration.

No instructions were given you as to a permanent assignment to Montana, but directions were forwarded indicating that your stay in the latter State would probably extend over the coming surveying season.

I regret that I cannot immediately comply with your personal request to return to Washington to continue examinations there as the exigencies of the work may require a longer detention in Montana.

I will, however, endeavor to have your examinations confined, as far as practicable, to the lower altitudes in eastern Montana, which I hope will enable you to prosecute the work with your usual fidelity.

Very respectfully,

L.J.

FRED DENNETT,  
Commissioner.

In Reply Please Refer to

"E"

WTP

83637)

83658) 1908

83659)

DEPARTMENT OF THE INTERIOR      W T P  
GENERAL LAND OFFICE

Washington, D. C., May 5, 1909.

Address only the  
Commissioner of the General Land Office

Procedure in Examination of Surveys.

Mr. M. P. McCoy,  
Examiner of Surveys,  
Great Falls, Montana.

Sir:

In reply to your letter dated April 17, 1908, you are hereby authorized to transport your two permanent assistants from the State of Washington to the District of Montana, where you are now engaged in the examination of surveys.

With reference to your proposed examination of surveys executed in northeastern Montana, payable from special deposits by the Northern Pacific Railway Co., you are advised that this office has, by letter of even date herewith, requested the Secretary of the Interior for general authority to authorize examiners of surveys to employ transitmen to organize auxiliary parties and examine surveys under the personal supervision of the examiners and upon the granting of such authority, you will be further advised.

Very respectfully,

FRED DENNETT,  
Commissioner.

JCB

In Reply Refer to

"E" DEPARTMENT OF THE INTERIOR C.L.D.B  
W.T.P.  
S3637) GENERAL LAND OFFICE  
88700) 1908

Washington, D. C., June 18, 1908.

Address only the  
Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,  
Examiner of Surveys,  
Great Falls, Montana.

Sir:

You are advised that under departmental authority dated May 5, 1908, examiners are authorized to employ a competent

assistant as transitman in charge of an auxiliary party under the supervision of the examiner to assist in the examination of surveys, at a salary of \$100 per month and actual necessary expenses of transportation and subsistence. In accordance with your recommendation dated April 21, 1908, you are hereby authorized to employ John D. King as transitman to assist you in the examination of the surveys assigned to you in northeastern Montana, and as outlined in your said letter. A solar transit, tripod, chain, tape and set of pins has been sent to you at Culbertson, Montana, the receipt for the two boxes sent by express being herewith transmitted. The report of work done by the transitman should be included in your weekly report.

Very respectfully,

H. H. SCHWARTZ,

JCP

Acting Assistant Commissioner.

In Reply Please Refer To

DEPARTMENT OF THE INTERIOR C.L.D.B.

E. GENERAL LAND OFFICE

W.T.P.

151779-1908

Washington, D. C., August 22, 1908.

Address only the

Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,

Examiner of Surveys,

Great Falls, Montana.

Sir:

In reply to your letter dated August 12, 1908, relative to the examination of surveys in Montana, you are advised that the Surveyor General has been directed to transmit to you at the earliest practicable date the data for the examination of contracts No. 515, A. E. Cumming, D. S., Nos. 530 and 531, Fessenden and Ross, D. D., and No. 542, R. C. Durnford, D. S.

The survey under contract No. 505 within the Fort Peck Indian Reservation is being examined by A. F. Dunnington, Topographer in Charge of the surveys within said reservation.

Weather and flood conditions in the southeastern part of the district early in the season rendered it expedient for examiner Wilkes to take up some of the work which it was thought would be examined by you later, but it is believed that there will be enough completed work in the northeastern part of the state to keep you steadily at work.

The Surveyor General reports the probable early completion of the contracts Nos. 518 and 519, George H. Potter, D. S. and Nos. 526 and 527, Williams and Hertz, D. S.

You will include also the examination of T. 9 N., R. 33 E., Harley J. Riley, D. S., under contract No. 500, Tps. 2 and 3 N., R. 28 E., Page and Page, D. S., contract No. 513 and T. 7 S. R. 24 E., contract No. 512, George L. Elmer, D. S., the same being isolated townships not yet examined.

Mr. Wilkes, whose address is Miles City, Montana, has been directed to confine his operations to the district south of the Yellowstone and east of the Big Horn Rivers and to send to you at Great Falls any data in his hands for the isolated work above referred to.

Very respectfully,

FRED DENNETT,

ALP.

Commissioner.

In Reply Please Refer To.

"E"

W.T.P.

W.T.P. DEPARTMENT OF THE INTERIOR C.L.D.B.  
189338-1908

GENERAL LAND OFFICE

Washington, D. C., November 25, 1908.

Address only the

Commissioner of the General Land Office

Instructions to Examiner of Surveys.

Mr. M. P. McCoy,  
Examiner of Surveys,  
Great Falls, Montana.

Sir:

In reply to your letter dated November 8, 1908, you are directed, upon the advent of unfavorable weather conditions for the prosecution of field work, to return to Seattle, Washington, and submit your reports.

You are requested to inform the Surveyor General of Montana, upon completion of your field examination of each survey, whether you will recommend the acceptance thereof, or, if corrections are required, to what extent.

Very respectfully,

FRED DENNETT,  
JCP. Commissioner.

OFFICE AUDITOR INTERIOR DEPT.

Feb 28 1912

A.M.9            12            2            4 P.M.

March 4, 1910.

The National Bank Of Commerce,  
Seattle, Washington.

Gentlemen:

On behalf of the United States of America, I hereby make demand upon you for repayment of the sum of \$15,129.81, on account of checks which were issued by M. P. McCoy, examiner of surveys and special disbursing agent for the Department of the Interior during the years 1907, 1908 and 1909, which checks were paid by you upon forged endorsements, the endorsement of payee in each instance being a forgery.

Attached hereto is the list of said checks with the date of each, the name of the payee, the amount of each check, and the bank or banks through which it was passed before being paid by the National Bank of Commerce.

All these checks are in my office at the Federal Building and your officers and attorneys will be allowed to inspect them if you so desire.

Respectfully,

ELMER E. TODD,

United States Attorney.

Encl

#### RETURN OF SERVICE

The United States of America  
Western District of Washington—ss.

I hereby certify and return that I served the annexed letter on the therein-named bank by delivering the original thereof to R. R. Spencer, its 1st vice president, personally, at the place of business of said bank at Seattle in said District on the 5th day of March, A. D. 1910.

C. B. HOPKINS,

United States Marshal,

By M. T. McGRAW, Deputy.

No.	Date.	Payee.	Amount.
1	Oct. 14, 1907	Albert Peterson	\$ 20.00
2	" 14,	Nels Anderson	20.00
3	" 14,	Wm. Jager	60.00
4	" 14,	H. Berggren	47.50
5	" 31,	F. L. Day	28.00
6	" 31,	G. Hoge	28.00
7	" 31,	Frank Engberg	96.00
8	" 31,	Chas. Lund	78.75
9	" 31,	J. D. King	62.00
10	" 31,	F. M. Clark	62.00
12	Nov. 30,	F. L. Day	52.50
13	" 30,	G. Hoge	52.50
14	" 30,	Frank Engberg	180.00
15	" 30,	Chas. Lund	150.00
16	" 30,	J. D. King	60.00
17	" 30,	F. M. Clark	60.00
19	Dec. 31,	F. L. Day	54.25
20	" 31,	G. Hoge	54.25
21	" 31,	Frank Engberg	186.00
22	" 31,	Chas. Lund	155.00

Bank or Bank through  
which check passed.

Columbia Valley Bank

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No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
23	Dec. 31, 1907	F. M. Clark	\$62.00	Columbia Valley Bank
24	" 31, "	J. D. King	62.00	"
26	Jan. 10, 1908	F. L. Day	17.50	"
27	" 10, "	G. Hoge	17.50	"
28	" 10, "	Frank Engberg	60.00	"
22	" 31, "	Chas. Lund	50.00	"
30	" 13, "	J. D. King	26.00	"
31	" 13, "	F. M. Clark	26.00	Seattle Natl. Bank
43	May 6,	John Jabelson	27.50	First Natl. Bank of
44	" 6,	John S. Cole	36.00	Havre, Mont.
45	" 31, "	J. D. King	62.00	"
46	" 31, "	F. M. Clark	62.00	"
47	" 31, "	A. J. Whitney	54.25	"
48	" 31, "	H. M. Benson	125.00	"
49	" 31, "	C. A. Thrapp	150.00	"
50	June 10,	H. M. Benson	48.75	"
51	" 10, "	C. A. Thrapp	72.00	"
52	" 23, "	J. E. Scherer	78.00	First Natl. Bank Glasgow,
53	" 23, "	H. M. Benson	63.75	Mont., & Seattle Natl. Bank
54	" 30, "	J. D. King	69.33	"

Bank or Bank through  
which check passed.

No.	Date.	Payee.	Amount.
55	June 30, 1908	F. M. Clark	\$60.00
56	" 30,	A. J. Whitney	54.25
57	" 30,	H. A. Moore	63.00
58	" 30,	D. H. Sullivan	12.25
59	" 30,	Geo. D. Cook	14.00
60	" 30,	F. W. McCulley	14.00
61	" 30,	S. F. Cady	12.25
62	" 30,	H. M. Benson	54.00
2	July 31,	J. D. King	100.00
3	" 31,	F. M. Clark	62.00
4	" 31,	Geo. D. Cook	62.00
5	" 31,	F. M. McCulley	62.00
6	" 31,	A. J. Whitney	62.00
7	" 31,	H. A. Moore	279.00
8	" 31,	D. H. Sullivan	54.25
9	" 31,	S. F. Cady	54.25
10	" 31,	H. M. Benson	248.00
12	Aug. 31,	J. D. King	100.00
13	" 31,	F. M. Clark	62.00
14	" 31,	Geo. D. Cook	62.00

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
15	Aug. 31, 1908	F. W. McCulley	\$62.00	Seattle Natl. Bank
16	" 31,	A. J. Whitney	62.00	First Natl. Bank Glasgow, Mont., & Seattle Natl.
17	" 31,	H. A. Moore	279.00	"
18	" 31,	D. H. Sullivan	54.25	"
19	" 31,	S. F. Cady	54.25	"
20	" 31,	H. M. Benson	248.00	Seattle National Bank
22—A	Sept. 8,	A. Fetters	7.85	"
22—B	" 30,	J. D. King	100.00	"
23	" 30,	F. M. Clark	60.00	"
24	" 30,	Geo. D. Cook	60.00	"
25	" 30,	F. W. McCulley	60.00	"
26	" 30,	A. J. Whitney	60.00	"
27	" 30,	H. A. Moore	270.00	"
28	" 30,	D. H. Sullivan	52.50	"
29	" 30,	S. F. Cady	52.50	"
30	" 30,	H. M. Benson	240.00	"
1	Oct. 31,	J. D. King	100.00	"
2	" 31,	F. M. Clark	62.00	"
3	" 31,	H. A. Moore	279.00	"
4	" 31,	Geo. D. Cook	62.00	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
5	Oct. 31, 1908	F. W. McCulley	\$62.00	Seattle National Bank
6	" 31,	A. J. Whitney	62.00	"
7	" 31,	H. M. Benson	248.00	"
8	" 31,	(Blank)	54.25	"
9	" 31,	S. F. Cady	54.25	"
11	Nov. 30,	J. D. King	100.00	National Bank of Montana, Helena
12	" 30,	F. M. Clark	60.00	"
13	" 30,	Geo. D. Cook	60.00	"
14	" 30,	F. W. McCulley	60.00	"
15	" 30,	A. J. Whitney	60.00	"
16	" 30,	H. A. Moore	270.00	"
17	" 30,	D. H. Sullivan	52.50	"
18	" 30,	S. F. Cady	52.50	"
19	" 30,	H. M. Benson	240.00	"
21	Dec. 31,	J. D. King	100.00	Seattle National Bank
22	" 31,	F. M. Clark	62.00	"
23	" 31,	Geo. D. Cook	62.00	"
24	" 31,	F. W. McCulley	62.00	"
25	" 31,	A. J. Whitney	62.00	"
26	" 31,	D. H. Sullivan	54.25	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
27	Dec. 31, 1908	S. F. Cady	\$54.25	Seattle National Bank
28	" 31,	T. E. Lynch	24.50	"
29	" 31,	Claude J. Perret	24.50	"
30	" 31,	H. M. Benson	276.00	"
31	" 31,	H. A. Moore	279.00	"
1	Jan. 5, 1909	J. D. King	12.90	"
2	" 5,	F. M. Clark	8.00	"
3	" 8,	Geo. D. Cook	16.00	"
4	" 8,	F. W. McCulley	16.00	"
5	" 8,	A. J. Whitney	16.00	"
6	" 8,	D. H. Sullivan	14.00	"
7	" 8,	S. F. Cady	14.00	"
8	" 8,	H. M. Benson	48.00	"
9	" 8,	H. A. Moore	72.00	"
14	Mar. 31,	J. D. King	35.48	"
15	" 31,	F. M. Clark	22.00	"
16	" 31,	Geo. D. Cook	18.00	"
17	" 31,	F. W. McCulley	18.00	"
18	" 31,	A. J. Whitney	18.00	"
19	" 31,	Joe Mikel	14.00	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.	
				Seattle National Bank	"
20	Mar. 31, 1909	E. M. Bassett	\$14.00		
21	" 31,	Geo. K. Cooper	14.00		
22	" 31,	Chas. Paine	14.00	"	"
23	" 31,	H. M. Benson	82.50	"	"
24	" 31,	A. C. Junkin	72.00	"	"
1	Apr. 30,	J. D. King	100.00	"	"
2	" 30,	F. M. Clark	60.00	"	"
3	" 30,	Geo. D. Cook	60.00	"	"
4	" 30,	F. W. McCulley	60.00	"	"
5	" 30,	A. J. Whitney	60.00	"	"
6	" 30,	Joe Mikel	52.50	"	"
7	" 30,	E. M. Bassett	52.50	"	"
8	" 30,	Geo. K. Cooper	52.50	"	"
9	" 30,	Chas. Paine	52.50	"	"
10	" 30,	A. C. Junkin	270.00	"	"
11	" 30,	H. M. Benson	300.00	"	"
13	May 31,	J. D. King	100.00	"	"
14	" 31,	F. M. Clark	62.00	"	"
15	" 31,	Geo. D. Cook	62.00	"	"
16	" 31,	F. W. McCulley	62.00	"	"
17	" 31,	A. J. Whitney	62.00	"	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
18	May 31, 1909	Joe Mikel	\$54.25	Seattle National Bank
19	" 31,	E. M. Bassett	54.25	"
20	" 31,	Geo. K. Cooper	54.25	"
21	" 31,	Chas. Paine	54.25	"
22	" 31,	A. C. Junkin	279.00	"
23	" 31,	H. M. Benson	310.00	"
25	June 30,	J. D. King	100.00	"
26	" 30,	F. M. Clark	60.00	"
27	" 30,	Geo. D. Cook	60.00	"
28	" 30,	F. W. McCulley	60.00	"
29	" 30,	A. J. Whitney	60.00	"
30	" 30,	Joe Mikel	52.50	"
31	" 30,	E. M. Bassett	52.50	"
32	" 30,	Geo. K. Cooper	52.50	"
33	" 30,	Chas. Paine	52.50	"
34	" 30,	H. M. Benson	300.00	"
35	" 30,	A. C. Junkin	270.00	"
1	July 31,	J. D. King	100.00	"
2	" 31,	F. M. Clark	62.00	"
3	" 31,	Geo. D. Cook	62.00	"
4	" 31,	F. W. McCulley	62.00	"

No.	Date.	Payee.	Amount.	Bank or Bank through which check passed.
5	July 31, 1909	A. J. Whitney	\$62.00	Seattle National Bank
6	" 31, "	Joe Mikel	54.25	"
7	" 31, "	E. M. Bassett	54.25	"
8	" 31, "	Geo. K. Cooper	54.25	"
9	" 31, "	Chas. Paine	54.25	"
10	" 31, "	A. C. Junkin	279.00	"
11	" 31, "	H. M. Benson	310.00	"
13	Aug. 31, "	J. D. King	100.00	"
14	" 31, "	F. M. Clark	62.00	"
15	" 31, "	Geo. D. Cook	62.00	"
16	" 31, "	F. W. McCulley	62.00	"
17	" 31, "	A. J. Whitney	62.00	"
18	" 31, "	Joe Mikel	54.25	"
19	" 31, "	E. M. Bassett	54.25	"
20	" 31, "	Geo. K. Cooper	54.25	"
21	" 31, "	Chas. Paine	54.25	"
22	" 31, "	A. C. Junkin	279.00	"
23	" 31, "	H. M. Benson	310.00	"

Indorsed: Ex. "K." 1933. Filed U. S. District Court, Western District of Washington. Mar. 13, 1912. A. W. Engle, Clerk. By S. Deputy.

*In the Circuit Court of the United States for the Western  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
NATIONAL BANK OF COMMERCE,  
a corporation,  
Defendant. } No. 1933-C

Testimony of M. P. McCoy, a witness in behalf of the plaintiff, taken before

DENTON M. CROW,  
United States Commissioner, at Spokane, Washington,  
February 19, 1912.

Mr. McLaren, of Todd & McLaren, appearing in behalf of the plaintiff.

Mr. McCord, of Kerr & McCord, appearing in behalf of the defendant.

The United States of America  
Eastern District of Washington  
State of Washington  
County of Spokane.—ss.

The examination of a witness *de bene esse*, beginning on the 19th day of February, 1912, on behalf of the plaintiff, before me, Denton M. Crow, a United States Commissioner in and for the Eastern District of Washington, at my office at the City of Spokane, Spokane County, Washington, in a certain suit now pending in the United States District Court for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff, and The National Bank of Commerce, a corporation, is defendant,

M. P. MCCOY, a witness on behalf of the plaintiff, being first duly sworn, on oath deposes and says as follows:

**DIRECT EXAMINATION by Mr. McLaren.**

Q Your name is M. P. McCoy, is it?

A Yes sir.

Q You were formerly in the Government service?

A Yes sir, as examiner of surveys for the General Land Office.

Q What was your official title?

A Examiner of Surveys and Special Purchasing Agent.

Q Where were your headquarters?

A Seattle.

Q During what period of time did you occupy that position?

A From about 1900 until about two years ago.

Q About November, 1909?

A Yes sir.

Q You held that position continuously during that time?

A Yes sir.

Q What other important position, if any, did you hold prior to that period?

A I was a member of the Geological Survey for the Interior Department.

Q For about how long?

A For about ten years before that.

Q What were your duties as examiner of surveys and special disbursing agent, what was the nature of your work?

A The public lands are surveyed by contract, by deputy surveyors and my business was to inspect their surveys in the field after their finishing their work—checking it up in other words to see if it was correct.

Q About how wide a territory did your duties cover?

A Well I was in the States of Washington, Oregon, Idaho and Montana.

Q And you say that your headquarters were at Seattle?

A Yes sir.

Q What was it necessary for you to do, Mr. McCoy, in or-

der to go around examining these public—these surveys of public lands, what did you have to do?

A To inspect the surveys in the field, which necessitated transportation and assistants and subsistance for the assistants.

Q You were authorized by the Government to employ men for that purpose?

A And to incur all these expenses.

Q Were some of these surveys made in the State of Washington?

A Yes sir.

Q Where for instance?

A Well throughout the state.

Q You got your instructions from Washington, D. C.?

A Yes sir.

Q Were these instructions given to you for each particular survey, or were they in the nature of general instructions which you were to follow out?

A There were general instructions and sometimes special instructions.

Q Under the general instructions, did you have your own option as to the order in which you took up the examination of the different surveys?

A Yes sir.

Q What arrangement was made relative to the payment of the bills that you might incur under your authority for the performance of your duties?

By MR. McCORD:

Q Were these instructions in writing?

A Yes sir.

By MR. McLAREN:

Q What became of these instructions, Mr. McCoy?

A I burned them something like two years ago, when this trouble began, I burned all my field notes and note books and all things of that kind. I had a trunk full and I burned them.

Q Can you give us, briefly, the arrangements you had with

the Government, whereby this money was to be paid for labor, or for services, or material, which you might incur?

MR. McCORD: I object as that is not the best evidence and no proper foundation has been laid for the introduction of secondary evidence.

Q I will ask you this question, Mr. McCoy—From where did you get your instructions regarding the payment of this money?

A From the commissioner of the general land office.

Q Were they oral, or in writing?

A Written.

Q These written instructions, you still have them?

A No sir.

Q What became of them?

A I burned them.

Q I will ask you what your instructions were, as to how you were to pay these men?

MR. McCORD: I object as it is not the best evidence; asking for the contents of a written instrument; there is not shown any reason why the originals cannot be produced. The best evidence would be the files in the Land Office at Washington, or a copy of them.

A My instructions were to pay the necessary expenses to carry out the examination of these different surveys.

Q How were you to pay them?

A I was to pay them as disbursing agent.

Q I mean by check or by cash?

A Well laterly I paid everything—I guess during this period in dispute, I guess, I paid everything by check.

Q On what banks were your checks drawn?

A The National Bank of Commerce of Seattle.

Q You had an account there?

MR. McCORD: I move to strike out the testimony as not responsive to the question, he asked how he was instructed to do and he answered how he did it.

A Yes sir, I had an account with the National Bank of Commerce as Special Disbursing Agent.

Q You drew on that account, in accordance with your instructions, for the payment of bills and expenses?

A Yes sir.

Q Now, Mr. McCoy, I will ask you to examine this bundle of checks, which I hand you, and state whether, or not, they were issued by you while you were in the employ of the Government?

A Yes sir.

Q On each check that is your signature, M. P. McCoy, Examiner of Surveys and S. P. A.

A Yes sir.

Q S. P. A.? Special Disbursing Agent.

A Yes sir.

Q Mr. McCoy, what is the meaning of the marginal notation, Voucher Number 6, or Voucher number so and so, on the check, what does that refer to?

A In making my quarterly statement, or rendering my quarterly account to the General Land Office, I submitted a voucher for each check, up until along about in September, or October, or November, 1909.

Q 1908 you mean, Mr. McCoy?

A Yes sir, it was in 1908, from that time on I used a new form of payroll that covered the payroll expenses, but I still used the voucher plan for sustenance and transportation.

Q And supplies?

A Yes sir.

Q Examine these checks again, Mr. McCoy, are the names of the payees real or fictitious persons in each instance?

A Fictitious.

Q That is there were no such persons?

A No sir.

Q Does this apply to each of them to whom these checks were made out?

A Yes sir.

Q Examine the endorsements on the back, Mr. McCoy, and state whose individual endorsement is on the back of these checks, if you know?

A I do.

Q Are these endorsements, one or more on each check, are these the endorsements of real persons or fictitious persons?

A Fictitious persons.

Q Did the Government receive any services, or supplies or anything of value in exchange for these checks?

MR. McCORD: I object to that as incompetent, irrelevant and immaterial.

A No sir.

Q Did you receive the money on these checks, in each instance?

A Yes sir.

Q For the amount of the check?

A Yes sir.

Q So far as the appearance of these checks go, Mr. McCoy, are they made out in the same form and in the same manner as you made out checks to real persons for real services rendered?

A They are.

Q That is they are apparently regular on their face, are they not?

A Yes sir.

Q I believe I asked you if you made the endorsements on the back yourself?

A Yes sir.

Q Take, for instance, the first check, October 14, 1907, number one, payable to Albert Peterson, you had no such person as Albert Peterson rendering service at that time?

A No sir.

Q You endorsed it Albert Peterson and J. D. King?

A Yes sir.

Q And that way you received the money yourself?

A Yes sir.

Q That statement of fact is true of each check?

A Yes sir.

MR. McLAREN: I offer in evidence this bundle of checks, as plaintiff's exhibit "A."

MR. MCCORD: I object as incompetent, irrelevant and immaterial and the instruments not properly identified.

Q You got these blank checks from the National Bank of Commerce when you opened up your account?

A Yes sir.

Q Did the cancelled checks come back to you, Mr. McCoy, or were they sent by the bank to the Department?

A They did not come back to me.

Q Now while you were—During the period that is covered by these checks, you were doing some actual work for the Government, were you not, in the performance of your duties?

A Yes sir.

Q How often were you required to send in reports to the Department in Washington?

A Weekly.

Q Did you send in weekly reports during this period covered by these checks in evidence?

A Yes sir.

Q I believe you testified that these checks, so far as appearance goes, are the same as real checks issued to real persons by you?

A Yes sir.

Q Now you spoke, a moment ago, Mr. McCoy, about a voucher system that was prevalent between you and the Department, I will ask you now to take this bundle of vouchers and examine them, these for the—marked for the month of October, 1907. I will take voucher number six as an example. This purports to be signed by Albert Peterson, for services rendered of the amount of twenty dollars, from October 5th, 1907, to October 14, 1907, and down below that is the signature of M. P. McCoy approving the same,—Is that a genuine or fraudulent voucher?

A Fraudulent.

Q You signed the name Albert Peterson?

A Yes sir.

Q Then you approved it, with your own signature, as actually rendered to the Government for services?

A Yes sir.

Q Now will you go through the list of vouchers I hand you, for the month of October, 1907, and state whether or not they correspond with the voucher number noted on the margin of the checks for that same month—You have checked over these vouchers for the various months covered by the fraudulent checks shown as Exhibit "A"?

A Yes sir.

Q These vouchers are the vouchers referred to on the margin of the checks?

A Yes sir, they are.

Q How often did you send these vouchers to the Department?

A Quarterly.

Q Every three months?

A Yes sir.

Q I now hand you another document, certificate for the month of October, 1907, is that your signature, M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q That refers, does it not, to the individual vouchers that you have just examined for that month?

A Yes sir.

Q That is a statement that you sent in as a part, or a summary of the quarterly account?

A Yes sir.

MR. McLAREN: I now offer in evidence, as plaintiff's exhibit "B" the vouchers just testified to by the witness as having been sent in by him, quarterly, to the Department at Washington, D. C., for the following months: October, 1907; November, 1907; December, 1907; May, 1908; June, 1908; July,

1908; August, 1908; September, 1908; October, 1908; November, 1908; December, 1908; January, 1909; March, 1909; April, 1909; May, 1909, and June, 1909.

MR. McCORD: I object to each of them as incompetent, irrelevant and immaterial and for the further reason that they show, in the light of the witness's testimony that they are all fraudulent.

Q Mr. McCoy, state whether, or not, it is true that these vouchers, just introduced in evidence, were in accordance with the usual and regular method of handing in vouchers that was in use between you and the Department at the time that they were sent in?

MR. McCORD: I object to that as incompetent, irrelevant and immaterial.

MR. McLAREN: It may be stricken out by consent.

Q Is there anything in the—You say that, along about October, 1908, the Department changed this system of vouchers?

MR. McCORD: What do you mean by that?

MR. McLAREN: It just means that instead of the voucher plan, it was done by payrolls system.

MR. McCORD: What date was that made?

MR. McLAREN: October 8, 1908.

Q Examine these vouchers for October, 1908, and see if that was the new or the old system that was employed during that month, whether it is the individual voucher system, or the payroll system?

A That is the payroll system.

Q That is for sustenance?

A Yes sir.

Q You retained the individual voucher system for supplies and material?

A Yes sir.

Q How is it Mr. McCoy that no vouchers are found for the last two months' issue of fraudulent checks, that is the months of July and August, 1909—did you ever send in any vouchers for those two months?

A I sent no vouchers in because I was arrested before the quarterly account was sent in.

Q It is true, is it not, that the vouchers that you sent in for all of the other months were apparently regular and were in the usual form and manner?

A Yes sir.

MR. McCORD: Q. When were you arrested?

A September, 1909, about September 1st.

Q You say, Mr. McCoy, that you sent in statements to the Department quarterly, will you examine these—Referring, Mr. McCoy, to the voucher for October, 1908, and the other vouchers covered by the fraudulent period, whom did you say these vouchers were sent to?

A To the Commissioner of the General Land Office.

Q And were sent quarterly?

A Quarterly.

Q Now will you explain, Mr. McCoy, what these accounts are, which I hand you, and which are signed by M. P. McCoy special disbursement account?

A That is an account current for the quarter.

Q Covering the period from October 1st, 1907, to December 31st, 1907?

A Yes sir.

Q When you sent these quarterly account current in which you say you did quarterly, did you or did you not transmit with them the individual vouchers covering that same period?

A Yes sir.

Q Take the next one, from January 1st, 1908, to March 31st, 1908, is that your signature?

A Yes sir.

Q The same is true as to that?

A Yes sir.

Q The same is true as to all the vouchers down to a certain point?

A Yes sir.

Q Now calling your attention to the account current from July 1st, 1908, to September 30th, 1908?

A It is not true of that one. That is not the same thing I had in mind.

Q Take up the one, running from October 1st, to December 31st, 1908, and examine the leaflets on the inside, the outline of expenditures, the first item, October 31st is the payroll—That was the payroll system?

A Yes sir.

Q Now examine all of these quarterly accounts current, which I hand you, they are all signed by yourself, are they not as special disbursing agent?

A Yes sir.

Q These were sent in by you quarterly?

A Yes sir.

Q And, so far as their form is concerned, they were in due and proper form as was the customary practice of the Department?

A Yes sir.

Q Did these vouchers for expenditures, and also the payroll vouchers referred to in each of these accounts current include these fraudulent checks, Exhibit A?

A Yes sir.

MR. McLAREN: I now offer in evidence as plaintiff's exhibit "C," the quarterly accounts current, as follows: October 1st, 1907, to December 31st, 1907; January 1st, 1908, to March 31st, 1908; April 1st, to June 30th, 1908; July 1st, 1908, to September 30th, 1908; October 1st, 1908, to December 31st, 1908; January 1st, 1909, to March 31st, 1909; April 1st, 1909, to June 30th, 1909.

MR. McCORD: I object because they are incompetent, irrelevant and immaterial, and object to each of them as incompetent, irrelevant and immaterial.

Q Mr. McCoy, you sent in no quarterly account for the period after June 30th, did you?

A No sir.

Q The quarterly account was not yet due at the time you were arrested, is that the reason?

A Yes sir.

Q Is there anything on the face of these quarterly accounts, or upon the individual vouchers or payrolls vouchers that indicates any irregularity, or that indicates the practice, or I should say the fraudulent practice or scheme that you were carrying on?

MR. McCORD: I object to that as calling for the conclusion of the witness, that being the very thing that the jury is to pass upon and I object on the further ground that it is incompetent, irrelevant and immaterial.

Q State what that paper is?

A An account current.

Q For the period ending when?

A September 30th, 1907.

Q Beginning July 1st, 1907?

A Yes sir.

Q Any fraudulent items included in that account current?

A There were.

Q None of them covered by these checks—I will change the form of that question—Is that the usual form for the quarterly account that was in use?

A Yes sir.

Q Can you tell, from an examination of it, whether, or not any of these items were improperly allowed?

A Net from an examination of this alone, I would have to have the checks that correspond and then I could tell.

MR. McLAREN: I offer plaintiff's exhibit "D" a quarterly account.

MR. McCORD: I object to it as incompetent, irrelevant and immaterial and not properly identified.

Q You are living in Spokane, Mr. McCoy?

A Yes sir, I am.

**CROSS-EXAMINATION by Mr. McCord.**

Q How long did you say that you occupied the position of examiner of surveys and special disbursing agent?

A I had the position of examiner of surveys for about nine years, and during four or five years of that time I was special disbursing agent.

Q Prior to the time that you became special disbursing agent, who attended to that duty of disbursing.

A I did the disbursing. I paid the expenses of the men and rendered my account to the General Land Office and was reimbursed by check from the Interior Department.

Q Who advised you in the first instance?

A The Department advised me in the first instance, of what was necessary.

Q You advanced your own money?

A Yes sir.

Q After that time you adopted the system—

MR. McLAREN: You don't mean that he adopted the system, the office adopted the system, of course.

Q After you became disbursing agent and also examiner of surveys, I will ask you where you maintained your office, if you had one?

A I had no office.

Q You attended to the surveys in Washington, Idaho and Montana?

A Yes sir.

Q Did the Government have any other agent, or assistant but you in the transaction of this business?

A No sir.

Q Did they have any other person, or individual or agent upon the ground to assist you in doing this work, or to check your accounts?

A Do you mean, now, assistants who I employed myself?

Q Employed by the Government?

A Well they were employed by me for the Government.

Q Who did you employ?

A My assistants in the field?

Q Yes sir.

A Well I supposed—I employed assistants to assist me in making the examination of the surveys.

Q Did the Government employ any other men to aid you?

A No sir.

Q In checking your accounts as special disbursing agent—Did the Government check your accounts?

A The Department have a special distributing agents—their usual custom.

Q They sent men to Seattle to examine them or do it at Washington?

A At the General Land Office at Washington.

Q Were they out here, at any time, by any body?

A Not that I am aware of.

Q How did they detect your fraudulent scheme?

A Mr. Good, I forget his initials, a special agent of the Land Office discovered it there in Montana.

Q You were not checked up in your field work, or in your agents work by any body until shortly before you were arrested during the whole period of time that you were in the service of the Government, is that right?

A That is right.

Q How many surveys did you attend to—about, in a general way, about how much money did you expend legitimately in the service of the Government between 1900 and 1909?

MR. McLAREN: I object as incompetent and irrelevant.

A I don't remember.

Q Give it to me approximately?

A Without looking up the records, I could not say.

Q In the year 1900, when you went to work for the Government in the capacity of examiner of surveys, until the time of your arrest in 1909, state approximately how much money you expended legitimately for the Government, how much per year would you estimate it?

MR. MCLAREN: I make the same objection.

A Well I could not approximate it without looking over my—

Q Well about how much business were you doing—You can tell about how much you would do in a year—I am not trying to trap you into anything?

A If I could give you an approximate statement, I would gladly do so, but without going over the records, I don't see how I could do so.

Q As much as five thousand dollars?

A No sir.

Q One-half of that, twenty-five hundred dollars?

A No sir, nothing like that.

Q One thousand a year, would you say?

A The very outside limit would be one thousand dollars, I should say.

Q At any time, did the Government send any one else, so far as you know, to check up your work and see whether this money had been legitimately expended?

A No sir.

Q You have misunderstood the question, Mr. McCoy, have you not?

A It is only a surmise on my part, but I think there was a survey over in the extreme northeast part of Montana, over which several claimants were in litigation and I think possibly that it was reported that I had not been on the ground to make my examination.

Q What did this work consist of, examining *of* surveys?

Q The Government has public lands throughout these states and they make surveys of them.

Q This is done by United States Deputy Surveyors?

A Yes sir.

Q For the Government?

A Yes sir.

Q What did you do?

A Before the Government would accept it, I was sent into

the field to make an examination of the survey, whether it was in acceptable form, whether it was correctly done.

Q Did you go out and run the lines over and resurvey it?

A I was to approximately ten per cent of the lines run by the party.

Q As much as ten per cent?

A Yes sir.

Q You were supposed to hire assistants to do that?

A Yes sir.

Q Surveyors?

A Yes sir.

Q Now, Mr. McCoy, you have identified a bunch of checks here, plaintiff's exhibit "A," how do you know that these checks are the ones that you issued fraudulently—How can you tell?

A By recognizing my handwriting.

Q Every one is a different one, is it not?

A Yes sir.

Q And each individual check has a different signature—Do you mean to tell me that, from an examination of these checks that you can tell which ones you forged and which ones the signatures are legal?

MR. McLAREN: I object, the question assumes that there is a different payee for each check, which is not the case.

A I identify these from my own signature on the check.

Q When did you do that?

A At the time the check was issued.

Q When this list—When these checks were selected out, did you select them?

A No sir.

Q Who did?

A I couldn't tell you.

Q Did you go over the various checks that had been returned, with anybody in Washington and assist him in picking the forged checks, that is those that you forged?

A No sir.

Q You did not?

A No sir.

Q You have only made a cursory examination of these checks today, have you not?

A Yes sir.

Q You have not taken up each one individually and gone through them?

A Yes sir, each check.

Q Have you examined the signature on each one?

A Yes sir.

Q I would just like to have you tell me how you can remember five years after each one of these was taken which are genuine and which are not?

A Well I know that, during the time that these were issued, that I issued nothing but fraudulent checks.

Q Did you issue, at any time during the period from 1907 to 1909, anything but fraudulent checks—You don't mean that?

A None except those that were payable to myself.

Q From 1907 to 1909 you did nothing then—you did not issue a single check that was valid?

A Except those to myself.

Q Except the two hundred and seventy dollars a month?

A Yes sir my salary.

Q Everything else was fraudulent?

A Yes sir.

Q You did no work?

A I was doing work, but instead of passing checks to the parties that I employed in the field, I would pay them personally.

Q How much did you pay out in that way?

A I am unable to state.

Q About how much would these checks amount to, fifteen thousand dollars, about how much did you expend out of your own funds?

A I don't think I could even approximate it.

Q Would you say that you had expended five thousand, one-third of that?

A No sir.

Q About four thousand dollars?

A About a couple of thousand dollars.

Q You have no way of arriving at that estimate?

A No sir, I have no records.

Q You think that you have spent about a couple of thousand, or it may be more?

A It may be more or it may be less.

Q It may have been as high as five thousand dollars?

A I don't think it was as high as five thousand.

Q As much as four thousand?

A I don't think it was as high as five thousand.

Q What were you doing—You say that you paid some men for services rendered, and that you paid it out of your own money—Do you know of any of the men that you paid it to?

A No sir, I do not.

Q Can't you recall any of them?

A No sir.

Q What work did they do for which you paid them?

A Some were chainmen and some were flagmen and some were teamsters and some of them were stage drivers and some of them livery stable people.

Q You did go over onto the different surveys, during the period from 1907 to 1909, to September, 1909, you did carry on the checking of these surveys?

A Only a part of them. I did a few of them.

Q You were on all of them, were you not, with the exception of the one in northern Montana?

A No sir.

Q How many all together?

A I am unable to approximate. The records of the office will show, and I could not even approximate without having those records.

Q You made up reports on these various surveys and sent them in to the Government?

A Yes sir.

Q These reports showed that you had run the lines on at least ten per cent of the surveys, the deputy surveyor's work?

A Yes sir.

Q Is that right?

A Yes sir.

Q You mean to be understood that you did run ten per cent?

A Yes sir.

Q On some you did not run quite ten per cent?

A I only mean to approximate it.

Q You actually did the work of about ten per cent of the most of them?

A No sir, on a few of them.

Q On others you did part of the work and certified that you did it all?

A Yes sir.

Q On all of them, with the exception of in northern Montana, you did some work?

A No sir.

Q What others?

A Well in quite a majority I did not examine in the field at all.

Q Didn't do any field work at all?

A No sir.

Q You had nobody do it?

A No sir.

Q You cannot tell now a single man who worked for you, that you paid, between 1907 and 1909?

A No sir, not a single man.

Q Not a single man?

A No sir.

Q Where did you keep this money, at Seattle?

A No sir, on the ground. That is, wherever I happened to be making examinations of surveys.

Q What sort of a report would you send in with the vouchers, would you draw a plat showing the survey?

A No sir, I would send in the field notes covering the ground.

Q You would send in the field notes you had gotten from the deputy surveyor's work?

A I didn't get them from the deputy surveyor, I got them from the Surveyor General's office.

Q You used the same notes in sending them in?

A Yes sir.

Q If you had done the work individually, they would not have checked with the work in the Surveyor General's office, would they—If you had made these surveys and run your own lines, it would not have checked correctly with the work in the Surveyor General's office, would it?

A No sir.

Q In checking, did you simply try to run over the lines made by the deputy surveyor on the ground and find his monuments?

A Yes sir.

Q And during this time, a period of two years, you simply copied the notes from the Surveyor General's office?

A They were not copied, they were faked, we made our—

Q They were taken from the Surveyor General's office?

A The only data we had was taken from the Surveyor General's office.

Q They were reproductions of his notes?

A No sir.

Q You went to the Surveyor General's office and copied them?

A Yes sir.

Q Copied them as they were shown in his office?

A No sir, but I would not send in notes unless they would correspond in a general way.

Q You would modify them in some way?

A Yes sir.

Q Well now then how did you do when you actually re-run the lines, did you try to make changes in them?

A No, I would return the conditions as I found them. I would take my own field notes and my reports would be exact copies of my own field notes.

Q Wherever you found the monuments made by the surveyor, in those cases the notes would be identical, but in those notes that you faked from the notes in the Surveyor General's office—

A So far as the monuments and as to the topography they were not the same.

Q When you faked the notes you were not the same?

A It is seldom that any two men write up the same notes after going over a certain line.

Q Now then these checks that you draw, where did you cash them, Mr. McCoy?

A At different places around over the country.

Q Tell me how you would do it, take the first check for Albert Peterson, for twenty dollars—

A May I see the check, please.

(Exhibit "A" shown witness.)

Q The one on the top there, the back of the check shows—

A That I cashed it through the National Bank, or the Columbia Valley Bank of Wenatchee.

Q Did you take it in there yourself?

A No sir.

Q How did you arrange that?

A I sent these checks to this bank, under the name of J. D. King.

MR. McLAREN: You mean this particular check, you didn't send all of them? A This particular check.

Q J. D. King, who was he?

A A fictitious name, the same as the rest. I sent these checks to the Columbia Valley Bank in the name of J. D. King.

Q By mail?

A Yes sir.

Q From where?

A From the points, I don't remember now.

Q Did the bank send these checks—

A I opened up an account with the bank and sent these checks for collection.

Q You opened up an account in the first place?

A On this particular check as J. D. King.

Q Did you go there to open it?

A No sir, by mail. I sent these checks by mail in the first place.

Q You opened an account by mail?

A Yes sir.

Q Then you checked it out in the same name?

A Yes sir.

Q You forged the name of King to these checks?

A Yes sir.

Q How did you get the money—How did they send it to you?

A Then this was checked out in my favor by this man J. D. King, this fictitious King.

Q You cashed the checks in that way and sent to you by mail?

A Yes sir.

Q Were you ever in the Seattle National Bank?

A Yes sir.

Q Do you remember of any checks paid by them?

A Yes sir.

Q How did you manage that?

A Under the name of F. M. Clark.

Q Did you open an account under that name?

A Yes sir.

Q You went in personally?

A Yes sir.

Q You would go in there and deposit them yourself?

A Yes sir.

Q From time to time?

A Yes sir.

Q And then check them out?

A Yes sir.

Q How about the Mutual National Bank, how did you manage that?

A That was done by mail, under another name.

Q Where from?

A From some part of Montana, wherever I happened to be. I was at different points in Montana.

Q Would you send more than one check at a time?

A Yes sir. I would generally send the bunch for the month.

Q And have them placed to your account?

A Yes sir, to the account of these fictitious names.

Q King?

A Yes sir, or Clark.

Q Did you have more than one fictitious name?

A Yes sir, the first was J. D. King.

Q How many accounts did you have with the various banks — You had one under the name of J. D. King and one Clark, and what else?

A That is all.

Q And this was done under these two names?

A Yes sir, as I remember.

Q Then you would forge the name of King on the check and make it payable to your order?

A Yes sir.

Q You didn't go and draw the money yourself?

A No sir. It was sent by draft to me at Seattle and I would check it out from wherever I would happen to be.

Q When did you open the account with the National Bank of Commerce, or did you open it?

A The National Bank of Commerce, I opened an account there when they adopted this disbursing agent system.

Q Did you have the opening of the account yourself, or was it done from Washington?

A The deposit was made there from Washington, and I was notified of the fact.

Q The deposit was made from Washington?

A To my credit.

Q As M. P. McCoy, Special Disbursing Agent?

A Yes sir.

Q This was how the account was opened up?

A Yes sir.

Q You were directed to go there and leave your signature?

A Yes sir.

Q You went there and left your signature?

A Yes sir.

Q And you drew your money out of that account for various purposes connected with the Government?

A Yes sir.

Q Some that were legitimate, and some that were not, that is right, is it not?

A I checked that money out through other banks.

Q What—

A That is on checks cashed in other banks.

Q You drew checks?

A Yes sir and cashed the checks.

Q Every one of these checks contains your genuine signature?

A Yes sir.

Q And all of these in this bunch, to the best of your knowledge, are fictitious?

A Yes sir.

Q Is there anything on the face of these checks to advise or indicate the fact that there was anything fraudulent about them, was there?

MR. McLAREN: Which bank, the National Bank of Commerce?

A No sir, they are regular in every way.

Q The contents and endorsements are what the law required to be put upon them?

MR. McLAREN: I object as calling for a conclusion.

Q That is you have a pay-roll all proper for each draft forged?

A Yes sir.

Q That is on all of them?

A Yes sir.

Q Did you put the— I notice some of them have a voucher, number one voucher from the 6th to the 16th, you showed these vouchers to the bank, did you?

A No sir these vouchers were sent with my quarterly report to the land office at Washington.

Q You put in these all of the pay-rolls and sustenance and so on— I notice that some of them, or at least I thought some of them had no—did not have vouchers on them?

A The last ones, several of them are there not.

Q Some of these in April—in August, 1909, examine these for August, 1909, did you put notations of the purpose for which they were issued?

A No sir, it seems to have been left out.

Q Why was that?

A Well I don't remember why, an oversight on my part, I guess.

Q I will show you some in January, 1908—

A 1909 I suppose it is.

Q January, 1909, March, 1909, July, 1909, May, 1909, and June, 1909, examine these please—those do not seem to have any?

A These were after the adoption of the pay-roll system and the aggregate amount of these checks have been referred to in one voucher. The checks were referred to by number of the voucher rather than on the checks.

Q Did you exhibit your pay-rolls to the bank?

A No sir.

Q I see these checks, one bunch of them seems to have been paid direct, or part of these checks, take for instance the one for one hundred dollars, to J. D. King, the check is dated August 31, 1909, for one hundred dollars, number 13, and

August 31, 1909, for sixty-two dollars, in fact all of these for August, with the exception of one or two seem to have been drawn direct without the intervention of any other bank, were they not?

A No sir, these were paid through the Seattle National Bank and are stamped indistinctly on the back of them there.

Q They were paid through the Seattle National Bank?

A Yes sir.

Q Now you referred to your instructions a while ago, from the Government, they authorized you, when this deposit was put there to sign checks for this money in drawing it out, did it not?

A Yes sir.

Q You had authority from them to draw checks?

A Yes sir.

Q You showed that authority to the bank, I presume, you must have, did you not?

A Yes sir, I showed my letter of instructions to Mr. Maxwell, who was at that time cashier of the bank.

Q And these instructions that you got, you just exhibited them to him did you not?

A Yes sir.

Q You didn't give him any other instructions?

A No sir.

Q Just let him read your instructions?

A Yes sir.

Q The bank had no other instructions, except from reading your letter?

A I don't know, but I presume—

Q I don't want any of your presumptions— You don't know?

A I don't know. That letter instructed me to sign checks as Special Disbursing Agent.

Q No limitation was placed by that letter, or was placed on the bank by that letter, to paying any checks signed by you?

A No sir.

Q There were no conditions, it had been remitted direct to the bank to take your signature, and directing you to draw it out upon your signature, that was the size of these instructions, was it not?

A Yes sir, the purport of them.

Q That is the substance?

A I don't remember the wording exactly, but that is the substance or object of the letter.

Q To advise the bank that you had authority to draw any money placed to your credit as Special Disbursing Agent?

A Yes sir.

Q Now the bank, every month, rendered you a statement of your account, did it not?

A Yes sir.

Q And the vouchers, or the checks that you had used were not returned to you?

A No sir.

Q A list of them was returned to you in a statement of account?

A Yes sir.

Q Also the vouchers themselves and a statement were sent to the Department at Washington by the bank—That is the checks were sent to Washington?

A I don't know.

Q You don't know what the custom was?

A I presume they were but I had no means of knowing.

Q Your account was balanced up every month?

A Every quarter, yes sir.

Q Every month?

A No sir.

Q Was it every quarter?

A Every quarter.

Q The cancelled checks were sent to Washington—You understand that it is customary to send them to Washington?

A Yes sir, I do now.

Q These checks, so far as you know, were all sent to Washington at least every three months?

A Yes sir, I presume they were.

Q So that your account was balanced up every month between you and the bank?

A Yes sir.

Q The bank rendered you a statement every month?

A Yes sir.

Q They didn't wait until the end of the quarter, but rendered it every month to you?

A Yes sir.

Q They didn't render any to the Department at Washington?

A I don't know, I am sure.

Q Did the Government, prior to September, 1909, ever make any complaint or criticism of your acts or your dealings with the Government in regard to these examinations of surveys?

A No sir.

Q They never offered any criticism at all of any kind?

A Oh, once in a while there would be some item suspended for explanation, as for instance a telegram, a copy of which would have to be sent. Where I had failed to send a copy, or something like that, or some clerical error.

Q As I understand it, you sent in until October, 1908, you sent in to the Department at Washington vouchers for everything that you expended?

A Yes sir.

Q Purporting to be signed by the men who had done the work or furnished the supplies?

A Yes sir.

Q That is true, is it not?

A Yes sir.

Q These were sent in monthly, were they not?

A Prior to the adoption of the Special Disbursing Agent, yes sir.

Q After the adoption of the Special Disbursing Agent scheme, they were sent how often?

A Quarterly.

Q When was the disbursing agency feature adopted?

A I think after the first of October, 1908. That is when we began.

Q After the account was opened up in the bank in your name as Special Disbursing Agent and as Examiner of Surveys, from that time you sent in your vouchers quarterly?

A Yes sir.

Q And continued to do that until October, 1908, did you?

A I continued to do that until my arrest in 1909, September, 1909.

Q You sent in the vouchers, as well as the pay-rolls?

A No sir, sent in the pay-rolls after we adopted that plan.

Q October, 1908?

A Yes sir, prior to that time sent in vouchers.

Q You continued to send in pay-rolls quarterly after October, 1908?

A Yes sir.

Q So that throughout the whole history of these transactions, from the time you opened the account in the Bank of Commerce, until you were arrested, you sent in, every three months, vouchers for every dollar you claim to have expended?

A Yes sir.

Q These vouchers were used until October, 1908?

A Yes sir.

Q After October, 1908, the labor and services went in under the pay-roll?

A Yes sir.

Q You continued to have each member of the pay-roll sign that voucher?

A Yes sir.

Q They signed the pay-roll, each member that you claimed pay for services?

A They signed the pay-roll, yes sir.

Q Other services were on independent vouchers?

A Yes sir.

Q That was up to the time of your arrest?

A Yes sir.

Q The Government, at all times then, from 1907 up until the time of your arrest on September 1st, 1909, had these vouchers in its possession?

A Yes sir.

Q Now the Government could, very easily, by sending men out to check up the ground work and field work have ascertained that you had never been over it, could they not?

A Yes sir.

Q And that is the way that they finally stumbled onto the illegal practice?

A Yes sir.

Q Or it was an easy matter, was it not, to have found out from the people in the vicinity that you had not done this work, was it not Mr. McCoy?

A Except in the sparsely settled districts.

Q If they had made any investigation at all, or if they had enquired for any of these men you claim to have paid money to, they could have ascertained that the men could not have been produced?

A Yes sir.

Q So that by the simplest sort of an investigation they could have found out that there were no such people in existence as those whose names you had given?

A Yes sir.

Q Did they ever inquire from you, as to the men who composed these accounts, as to their residence or postoffice address of any of these individuals to whom you claim to have paid money?

A I think each voucher shows the postoffice address of each man who signed the voucher.

Q And all of these were fictitious and there was no such person at that place?

A No sir.

Q And a letter addressed to them would have been returned uncalled for?

A Yes sir.

Q I don't want to embarrass you, Mr. McCoy, but I want to ask you the question because I think it is necessary—When were you arrested and where?

A It was about the first of September, 1909.

Q Where were you arrested?

A At the Lincoln Hotel at Seattle.

Q With what offense were you charged?

A The offense of embezzlement of Government funds.

Q Of what particular embezzlement were you charged with?

A I don't remember.

MR. McLAREN: I will stipulate that he was indicted, arrested and sentenced for embezzlement covered by the checks shown in Exhibit "A."

Q Do you know what particular checks made up those you were arrested for embezzling on? What the particular funds were?

A I don't remember. I was rather embarrassed at the time the indictment was read to me, and I don't remember.

Q You were sentenced in Seattle?

A In Tacoma.

Q Were you tried?

A No sir.

Q You pleaded guilty to the indictment and you say that you don't know what was in it?

A No sir, I don't remember now.

Q You are now out on parol?

A No sir, I am at liberty, my parol expired on the 19th of last month.

Q So you are completely freed?

A Yes sir.

Q You are not pardoned?

A No sir.

Q So that your civil rights have not been restored?

A No sir.

Q Did you not make any application in person?

A No sir. I made an application for a parol and it was granted.

Q Mr. McCoy I will have to go into this a little more in detail, as I don't know how all of these different names here, that is the names of H. M. Benson, A. C. Jenkins, Charles Paine, George K. Cooper, E. M. Bassett, Joe Mikel, A. J. Whitney, F. W. McCulley, George D. Cook, F. M. Clark and J. D. King, all covering the month of August, 1909, I want you to tell me, if you can, how you can go through those and tell now, after the elapsing of five years, which ones of these signatures are fraudulent, and which are not, or that all of them are— I ask you whether you can do that from any independent examination of the signatures, as they now appear, or can you tell only because you were not doing any work during this period of time?

A I could not identify these from these fictitious signatures, but I can identify them from my own signature having issued the checks.

Q Well your signature does not appear on any of those checks—that is the signature of M. P. McCoy, except as the drawer of the check?

A That is all.

Q Can you independently say that all of these names placed on these checks and made by you, can you tell now from an examination of those signatures at this time— I don't see how it is possible— Tell me whether if you didn't have these passed up to you, and without any other information, whether you could tell whether these were forgeries?

A No sir, it would be impossible for me to tell.

Q If you saw the checks you could not tell that they were forgeries, except, as you say, between 1907 and 1909, you say that you did not issue any legitimate checks?

A Yes sir.

Q That is the only way you can tell?

A Yes sir.

Q That is also true of the vouchers, is it not, you could not tell that these were forgeries on the vouchers from an inspection of the vouchers at this time?

A Yes sir.

Q How?

A Simply by knowing that they were fraudulent.

Q I say by an examination of the voucher itself, independent of your personal knowledge, you could not tell, it would be an impossibility?

A No sir.

Q Now, Mr. McCoy, are you not mistaken in saying that, from 1907, the date of the first of these checks, October 14, 1907, to September 30, 1909, two years that you did not issue a single genuine check?

A Not as against the National Bank of Commerce.

Q How do you know that? You transacted business and had men in your employ, and were paying them from some source or other, now is it not possible that some of these checks that you drew were payable for a legitimate purpose and to the men who earned the money?

A No sir.

Q Why do you say that?

A Because whenever I incurred expenses in the field I paid it to the individuals themselves, and in order to carry this thing through I would issue checks against the National Bank of Commerce but only those that were fictitious.

Q What work were you doing from October, 1907, to September 30, 1909, what particular surveys were you examining?

A Surveys in the states of Washington, Idaho, and Montana. The records would show the title of each survey that is to whom contracts were let, but who they were now, I cannot recollect.

Q You are sure that you never drew any checks in their favor on the National Bank of Commerce?

A I am sure of that.

Q But you used the money that you got from the National Bank of Commerce in paying them?

A Yes sir, except those payable to myself.

Q The money that you got on these fraudulent checks you used, in part, to pay these men?

A Yes sir.

Q How much you have no means of knowing?

A No sir.

Q Otherwise that it is from one to four thousand dollars?

A Yes sir, somewhere within those sums.

Q But you did render services to the Government, valuable services, during that period, did you not in examining these surveys?

A Yes sir.

Q And employed men to assist you in getting the information you did furnish the Government?

A Yes sir.

Q And you did have men employed by you in examining surveys for the Government?

A Yes sir.

Q I would like to— If you can give me some more correct information as to the amount of money you spent on each particular survey, the number of men you would employ and I would like to have you try to recall, Mr. McCoy, about how much money you spent legitimately from 1907 to 1909, that you paid for out of funds that you carried in this bank?

MR. McLAREN: Q Is it your testimony, Mr. McCoy, that the actual services which you did pay for during this period, were paid out of these fraudulent checks, or did you put in a personal check to pay for these services? A I got this money individually.

Q Out of the proceeds of your personal checks?

A I paid them with my own money.

Q I want to get this clear— During the time that these fraudulent checks were sent in by you, you also sent in checks payable to yourself for different amounts, did you not?

A Yes sir.

Q Was it out of these checks, payable to yourself, that you paid the men that you had employed, or did you pay these men out of the proceeds of these fraudulent checks?

A I paid them with my own money. How I obtained that money, I obtained part of it by my own salary and overtime and part of the money I got from the fraudulent checks.

Q You kept all of this money in the bank?

A Yes sir.

Q The National Bank of Commerce?

A Yes sir.

Q When you got money from these fraudulent checks and legitimate money, you put them all together in one account?

A Yes sir.

Q Whether it was from one source or the other, part was from fraudulent sources and part from other sources?

A Yes sir.

Q You could not tell which?

A No sir.

Q You have no doubt but that you paid out from one to four thousand dollars for the Government in this way?

A Yes sir.

Q Most of it came from the fraudulent checks, because there were more of them?

A Yes sir.

Q So that you would say that the biggest part of what you did pay necessarily came from the money that you got on these fraudulent checks, that is the legitimate conclusion, is it not?

A Well the amount was so small that I was paying out, compared with what I was getting in, that I would not have any means of knowing where it did come from.

Q It was all mixed together?

A Yes sir.

Q The money which you did use to pay these legitimate expenses and labor was money paid out of your own personal bank account into which you had put the money realized from these fraudulent checks?

A Yes sir.

Q That is right, is it not?

A Yes sir.

Q Now take, for instance, the surveys for the year 1907, can you tell where you examined one—just recollect one where you did any work on it?

A Without having the records before me, I could not tell that.

Q It is possible, is it not, that you have paid out more than four thousand dollars?

A No sir, I should not estimate it any higher than that.

Q You think that four thousand is the maximum?

A Yes sir.

Q Would you consider that approximately the sum?

A I should say a couple of thousand. It might have been more or it might have been less.

Q It might have been as much as four thousand?

A It might have been over two thousand.

Q The last one of these vouchers was sent on September 30, 1907?

A No sir the last one went in—

Q June 30, 1909?

A Yes sir, June 30, 1909.

Q You didn't send in any after that?

A No sir.

Q But you drew quite a number of checks after that did you not?

A Yes sir, I drew checks at the end of July and to the end of August.

Q Did you keep any account in any other bank than the National Bank of Commerce as Special Disbursing Agent?

A No sir.

Q Did the Government not receipt to you for these various accounts that you sent in?

A No sir, it was not their practice, but they did, however, at the end of the year send me a statement from the auditor of the interior department of my account and including the account for the past year.

Q They verified your account at the end of 1907, did they?

A Yes sir.

Q And verified it at the end of 1908?

A Yes sir.

Q Tell you it was correct?

A Yes sir, letters were sent me from the Auditor of the Interior—from the Auditor of the Treasurer of the Interior Department and sent me these statements, at the end of these periods, stating that my account had been examined and found correct, or that there were some slight discrepancies and that they needed correction, or something of that kind.

Q What officer of the National Bank of Commerce did you do your business with, Mr. Maxwell?

A It was the young man who had charge of the disbursing of the Government funds in the rear of the office, I don't remember his name, in fact I never knew his name. He was one of the bank tellers.

Q Ever do business with Mr. Backus?

A No sir.

Q Did you ever do business with Mr. Stacey?

A No sir.

Q Did you ever do any business with Mr. Seewell?

A No sir.

Q Mr. Maxwell, you did show him your credentials?

A Yes sir.

Q Did you turn your signature over as Special Disbursing Agent?

A Yes sir.

Q And your written instructions were to show your orders to the bank, were they?

A I cannot recall exactly, but I was notified of this sum being placed to my credit in this bank.

Q You were authorized to draw it out on your signature?

A Yes sir.

Q You showed that to the bank?

A Yes sir.

Q You didn't tell them anything about your being unlimited in your power to draw that money?

A No sir, I simply showed them my letter.

Q The letter didn't contain any limitation on your powers?

A No sir.

Q It was an unconditional authority.

A Yes sir, I think the checks were to be signed by myself as Special Disbursing Agent.

Q With that exception there was no limitation?

A No sir.

Q There was no limitation on the authority of the bank to pay you money?

A No sir. The letter gave me authority to draw it out myself on my own order, but I don't think I could have drawn any checks under that authority payable to myself.

Q It didn't say anything about it at all?

A Well I was to draw this money as Special Disbursing Agent and I don't remember that it limited me at all.

Q You don't think that anything was stated as to any limitation at all?

A I don't think that there was any limitation stated.

Q When you say that you don't think that you could draw checks in favor of your own order, you are getting that from information other than that contained in the letter?

A Yes sir.

Q There was nothing in the contents of that letter that indicated that you could not draw it in your own favor?

A No sir, not that I can remember.

**RE-DIRECT EXAMINATION by Mr. McLaren.**

Q When were you paroled out Mr. McCoy?

A March 15th, last.

Q March 15, 1911?

A Yes sir.

Q You have been steadily employed in the City of Spokane for how long?

A Since June 15th.

Q For what firm?

A W. A. Richards, architects.

Q Since when?

A June 15, 1911.

Q You have never had any difficulty or trouble with the Government before this transaction of the fraudulent checks during all the time you worked?

A I never had any trouble with anybody, the Government, or anybody else.

Q Under your authority from the Government, you had no authority to pay out money, or draw checks against the account, except in payment of legitimate bills?

MR. McCORD: I object as incompetent, irrelevant and immaterial and asking for an interpretation of a question of law by the witness.

MR. McLAREN: It is the same thing that you have gone into.

MR. McCORD: I didn't, I asked him about the contents of the letter.

Q When you told Mr. McCord that your letter of instructions, which you showed to the bank authorized you to draw checks against the funds without any condition, you didn't mean, did you that you were authorized by the Government, by that letter, to draw any checks, except in payment of bills?

MR. McCORD: I object to that as calling for a conclusion of the witness, seeking for an interpretation of the law upon the very question at issue here and the witness not qualified to answer it, and incompetent, irrelevant and immaterial.

Q Was that your understanding, Mr. McCoy?

A I hardly know how to answer that. I cannot say that I really understand the question.

Q You didn't mean, in answer to Mr. McCord's question to say that you were given authority to draw these checks, Exhibit A?

MR. MCCORD: I object as it is calling for a conclusion of the witness and a legal opinion and asking for something that requires expert knowledge and that would require legal knowledge in the judge and jury and the very question at issue in this case.

MR. McLAREN: The question is withdrawn.

Q During the time covered by these checks, you were not doing much of any work—Were you doing anything in April, 1908, do you recollect being over at Great Falls, Montana?

A I don't remember anything specially.

Q I hand you four vouchers, numbered fifteen, sixteen, seventeen and eighteen, commencing April, 1908, to J. D. King, A. M. Anderson, F. M. Clark and Fred Evans, state whether these were fraudulent?

A Yes sir.

Q You received the money on these vouchers?

A Yes sir.

MR. McLAREN: I offer in evidence plaintiff's exhibit "E" (Vouchers Nos. 15, 16, 17, 18).

MR. MCCORD: I object as incompetent, irrelevant and immaterial, not involved in this case as counsel has stated.

Q I hand you voucher for November, to yourself, for two hundred and seventy dollars— Can you state whether or not you worked during that month of November, 1907?

MR. MCCORD: I object as immaterial.

A No sir.

Q I hand you voucher for December, 1907, Great Falls, Montana, two hundred and seventy-nine dollars, to yourself, do you remember whether you rendered any services in that month?

MR. McCORD: I object to it as immaterial.

A I don't remember.

Q Did you get the money on these two vouchers, payable to yourself?

A Yes sir.

MR. McLAREN: I offer in evidence Plaintiff's Exhibit F (Vouchers Nov. and Dec., 1907, favor of witness).

MR. McCORD: I object to them as incompetent, irrelevant and immaterial.

Q Now I hand you a certificate, signed by yourself, for the month of April, 1908, and I will ask you, if, on the first page of this, that is your signature "M. P. McCoy, Examiner of Surveys?"

A Yes sir.

Q Calling your attention to the item of disbursements, as shown by that itemized statement, and calling your further attention to page two, to a certain entry of expenditures, under date of April 8th. "To J. J. Carlton, Darby, Montana, for hire two horses and buggy, with driver, expenses, etc., eighteen dollars, is that part of a voucher that you returned under that heading?

A It is.

Q Calling your attention to the second portion, marked page three, under date of April 30th, 1908, "To J. D. King, Great Falls, Montana, for services as chainman, from April 19 to 30 inclusive, twelve days, twenty-four dollars," is that the same J. D. King the fictitious person?

A Yes sir.

Q To F. M. Clark, Great Falls, Montana, services as chainman, twelve days, two dollars, twenty-four dollars, is that the same fictitious person?

A Yes sir.

Q Fred Evans, Conrad, Montana, for board and lodging assistants, J. D. King and F. M. Clark, John Howard, E. M. Roper and A. M. Anderson, forty-five dollars and six cents, those are the same fictitious persons?

A Yes sir.

Q Calling your attention to page two of this itemized statement, April 21st, "To J. L. Murray, Helena, Montana, for board and lodging assistants J. D. King and F. M. Clark April 21, four dollars." Those are fictitious persons are they?

A Yes sir.

Q Ray Jones, Great Falls, Montana, for board and lodging assistants J. D. King and F. M. Clark April 22nd, three dollars," that is fictitious, is it not?

A Yes sir.

MR. McLAREN: Plaintiff offers exhibit "G" Certificate of M. P. McCoy, during the month of April, 1908, consisting of two separate parts.

MR. McCORD: I object, incompetent, irrelevant and immaterial.

Q You testified a while ago that during this period covered by the fraudulent checks, you were doing some work, is that true?

A Yes sir.

Q That is on different surveys?

A Yes sir.

Q You also testified that you had paid these men money, did you employ the cash which you received on your own checks?

A Yes sir, I paid them in cash.

Q You testified further that you thought that the cash might have been from the proceeds of these fraudulent checks?

A Possibly, I mean, that is all.

Q Is it not true, as shown by the statement in Exhibit "G," which I have just shown you, that you had also received other money which you were not entitled to and which you didn't earn which is not covered by these checks?

A Yes sir.

Q When you say that possibly some real services may have been paid out of these fraudulent checks, you don't know whether it is true or not?

A Yes sir, I know it was true.

Q How much was there of it?

A Well I am unable to tell how much.

Q How can you tell that it was not paid out of these fraudulent checks?

A I cannot tell that it was out of these fraudulent checks, but it was out of my money.

Q You cannot tell that it was not paid out of these fraudulent checks?

A No sir, I paid it out of money that I obtained whether it was from my salary, per diem or from these I cannot say.

Q Do you recall, Mr. McCoy, how the expenses covered by these vouchers, for April, 1908, were paid to these fictitious persons named in there—To refresh your recollection, I will call your attention to the month of April, 1908, as to the fraudulent checks in this case, do you recollect how they were paid?

A That was done prior to my appointment as Special Disbursing Agent.

Q In 1908, this is in April and the appointment was—

A I don't understand why this—During part of this year I was addressed as special agent of the General Land Office, and I acted as special agent under instructions from the commissioner of the General Land Office, and during that time I was examining applications for surveys for different people around there over the different states in which I traveled and during that time I was acting as special agent and not as disbursing agent, and this month covers both, where I was acting as special agent and also as examiner of surveys.

Q How about May, 1908?

A Yes sir.

Q How about March, 1908?

A Yes sir, the same way.

Q I will call your attention to the itemized report for March, 1908, that is your signature M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q Disbursements as shown by within itemized statement and vouchers, one hundred and seventy-five dollars and twenty cents, that is the amount of the items set forth on the inside pages, is it not?

A Yes sir.

Q Is it not true, Mr. McCoy, that all of the actual services which you did incur, during the period covered by the fraudulent checks, were as a matter of fact itemized in your various reports, sent in and paid by the Government's money, either to you or to the persons whom you had hired by checks outside of these fraudulent checks which you have before you?

A Yes sir.

Q Then it could not be possible, if this is correct, that you paid for any of the actual services rendered out of the fraudulent checks, that would not be possible?

A It is possible in this way, that I had money obtained by fraud and also money obtained legitimately—

Q Is it not also true that all the money that you obtained legitimately would be paid through vouchers and checks other than these fraudulent ones?

A No sir.

Q Then why did you send in such a voucher as is shown on March, 1908, and also in April, 1908?

A That is when I was acting as special agent for the General Land Office.

Q Not disbursing any?

A I was not disbursing anything, but I was paying my railroad expenses and hotel bills.

Q During these two months is it not true that you put in accounts for King and Clark—

A That was during the latter part of the month, April, when I was acting as examiner of surveys.

Q I believe that you testified that you signed all of these vouchers and reports shown in Exhibit B, as M. P. McCoy, Examiner of Surveys?

A Yes sir.

Q Mr. McCoy in reference to your field notes, which you say were faked, during the time that you were not actually doing the work, as I understand your testimony in answer to Mr. McCord, you modified the field notes of the Surveyor General so as to give them the appearance of being genuine?

A Yes sir.

### RE-CROSS-EXAMINATION by Mr. McCord.

Q You say that these vouchers which you refer to, Exhibit G, covering the months of March and April, 1908, that then you were acting as special agent for the land department?

A During part of the time.

Q And in that case you rendered an account of the work you did and received the money for it, did you?

A That is the way I remember it.

Q Well now then, how long did you act as special agent of the department approximately?

A Well during each spring, for a month or two.

Q So that in 1908 and 1909 you were also acting as special agent?

A Yes sir. No, excuse me, in 1909 I am under the impression that I did not act as special agent.

Q During this whole time you draw two hundred and seventy dollars a month, you were busy with government work all the time yourself?

A Yes sir.

Q Do you consider that you earned the two hundred and seventy dollars a month, yourself?

A No sir. I didn't when I was acting as special agent.

Q Part of the time you say you were—you had men employed doing legitimate work making surveys during the time that you were entitled to your salary?

A Yes sir.

Q On most of them covering this early period, you yourself were engaged, were you not, in tending to the work you were having done, you said that you had quite a considerable work

done in examining surveys and running lines and you were employed by the Government and you were receiving money from the Government at that time, were you not?

A Yes sir.

Q So that during most of your time you would consider that you were fairly entitled to the money that you drew, two hundred and seventy dollars per month?

A No sir, not during the last two years, I didn't consider that I did.

Q They paid you your salary?

A Yes sir.

Q They never objected to paying it at any time, they never raised any question about paying you?

A Yes sir, small ones.

Q They never sued you to recover it back?

A Not that I am aware of.

Q How long a time, Mr. McCoy, did you spend in the penitentiary at McNeil's Island?

A A year and a half.

Q How long were you sentenced for?

A Three years.

Q You were paroled after about a year and a half?

A Yes sir.

## RE-DIRECT EXAMINATION by Mr. McLaren

Q You have just testified, Mr. McCoy, that you received your salary during all of that period and that the Government didn't protest the payment of your salary—I presume that you refer to your monthly vouchers which are shown in plaintiff's exhibit "B"?

A Yes sir.

Q And which you have certified as being correct?

A Yes sir.

Q On these vouchers is the alleged residence of the fictitious persons in each case, the place where they were supposed to have been living at that time?

A Yes sir.

Q You didn't do any work during the summer of 1909?

A No sir.

Q Did you ever do any work—

A Except early in the spring.

Q Can you tell approximately how many months pay you had rendered services for during the period covered by the vouchers you sent in—I don't mean exactly, but some where nearly?

A No sir, I could not tell you that.

Q Can you tell by consulting the names and addresses, Mr. McCoy?

A No sir, the only way I could tell it would be by having a list of the surveys, but I could not tell it from any information that I have here.

Q Could you tell from the Great Falls, Montana,—

A I was there mostly as special agent.

Q During the period covered by these checks, however?

A Yes sir.

Q There were no checks between January, 1908, and May, 1908, during the spring while you were examining these surveys and not disbursing any?

A No sir.

IT IS STIPULATED between the counsel, for both of the parties hereto, that they waive the reading of the testimony, after being transcribed, by the witness; and also the signing of the same by the witness, and hereby consent that the same may be transcribed by the reporter, from his shorthand notes taken, and, when so transcribed, may be certified by the Commissioner.

IT IS FURTHER STIPULATED that the said testimony, when transcribed, may be returned to the Clerk of the above entitled Court, with the certificate of the Notary or Commissioner, before whom the same was taken, that it is a full, true and correct transcript of the testimony of the witness, M. P.

McCoy, and that he was duly sworn before taking of the testimony.

The United States of America,  
Eastern District of Washington,  
State of Washington,  
County of Spokane—ss.

I, Denton M. Crow, United States Commissioner in and for the Eastern District of Washington, do hereby certify that the above named witness, M. P. McCoy, was by me first duly sworn to tell the truth, the whole truth and nothing but the truth; that his deposition was reduced to writing by H. G. Twomey, a disinterested person, in the presence of the said witness; that the foregoing is a full, true and correct transcript of the testimony of the witness M. P. Coy and that the reading and signing of the deposition was waived by stipulation contained herein.

That said deposition was taken, pursuant to the annexed stipulation, at my office in the City of Spokane, Spokane County, Washington, beginning at 2 P. M. of February 19, 1912, and being completed on the same day;

That the parties were represented at the taking of said deposition by their respective counsel, as set forth; that the several exhibits recited were offered in evidence and marked as specially noted in the foregoing deposition and that I am not counsel, or a relative of either party, nor otherwise interested in the event of this suit.

(Seal)

DENTON M. CROW,  
United States Commissioner.

Dated February 23, 1912.

*United States District Court, Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA,  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
*Plaintiff,*  
*Defendant.*

} No. 1933—C.

STIPULATION FOR TAKING DEPOSITION.

IT IS HEREBY STIPULATED between the parties hereto, through their respective undersigned attorneys of record, that the deposition of M. P. McCoy, a witness for the plaintiff, residing at Spokane, State of Washington, may be taken upon an open deposition upon examination by the plaintiff's attorney and cross-examination of the defendant's attorneys by virtue of this stipulation and without commission or other authority or power by Denton M. Crow, United States Commissioner residing at said city of Spokane, on the 19th day of February, 1912, commencing at the hour of two o'clock P. M., or as soon thereafter as the same may be commenced, and the taking of said deposition may be adjourned from time to time to suit the convenience of said Commissioner and said witness, provided that nothing herein contained shall unreasonably delay the trial of this action.

The certificate of said Commissioner shall be sufficient proof of his name and official character without other or further authority; all formalities being hereby expressly waived.

Said deposition when taken shall be mailed by the said Commissioner to the Clerk of the above entitled Court, at Seattle, King County, Washington, and may be read in evidence by

either party, subject to objection as to the competency, materiality, or relevancy of the testimony set forth therein.

Dated this 16th day of February, 1912.

ELMER E. TODD,  
United States Attorney.

W. G. MCLAREN,  
Assistant United States Attorney.

KERR & McCORD,  
Attorneys for Defendant.

Indorsed: In the District Court of the United States for the Western District of Washington, Northern Division. The United States of America, Plaintiff, vs. National Bank of Commerce of Seattle, Defendant. Deposition of M. P. McCoy, a witness called by Plaintiff. Taken at Spokane, Washington, on February 19, 1912, before Denton M. Crow, United States Commissioner for the Eastern District of Washington, Eastern Division. Also exhibits A-G inclusive, filed with the said deposition. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 26, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States District Court, Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA, }  
                                *Plaintiff,* }  
vs.                            }  
NATIONAL BANK OF COMMERCE, }  
                                *Defendant.* } No. 1933—C.

#### BILL OF EXCEPTIONS.

For the purpose of making the foregoing matters a part of the record herein, I, Edward E. Cushman, Judge of the United

States District Court for the Western District of Washington, now on this 29th day of August, 1912, and within the term of this court during which the trial of the above entitled cause was held, do hereby certify that this cause was tried before the Honorable Cornelius H. Hanford, Judge of such court, with a jury, as aforesaid; that said Cornelius H. Hanford has since duly and regularly resigned said position as such Judge, which said resignation has been duly and regularly accepted, and that I am a Judge of the court in which the above entitled cause was tried, holding such court; that the evidence in said cause has been taken in stenographic notes, and that from said notes and from the admissions of counsel herein, I am satisfied that I am fully advised in the premises and can pass upon and allow a true bill of exceptions herein; and that the time for filing and serving said Bill of Exceptions having been enlarged and extended to and including the 31st day of August, 1912, by order of this Court and pursuant to stipulation between the respective parties hereto.

I further certify that on this day came on for settlement and certification the Bill of Exceptions in this cause, on the proposed Bill of Exceptions of plaintiff; counsel appearing for both parties, and the defendant by its attorneys, Kerr and McCord, agreeing that said proposed Bill of Exceptions and the deposition and exhibits therein set forth or referred to or hereto attached, be settled and certified as a true and correct Bill of Exceptions in said cause;

And I further certify that having duly settled and hereby settling and allowing the foregoing bill of exceptions in said above entitled action, do hereby certify the same, and do hereby certify that this Bill of Exceptions, together with the deposition of M. P. McCoy herewith, and the exhibits marked plaintiff's Exhibits "A", "G", "H", "J" and "K", and plaintiff's rejected Exhibits "B", "C", "D", "E" and "F", therein set forth, or referred to, or hereto attached contains all the evidence, exhibits and other material facts, matters and proceedings in said cause, not already a part of the record therein.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand with his title of office, at Seattle, in the Northern Division of the Western District of Washington, this 29th day of August, A. D. 1912.

EDWARD E. CUSHMAN,  
District Judge of the United States for the Western  
District of Washington.

Indorsed: Plaintiff's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*In the District Court of the United States for the Western  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
Defendant. } No. 1933.

**ORDER TO TRANSMIT ORIGINAL EXHIBITS.**

Now on this 18th day of September, 1912, upon motion of the United States Attorney, and for sufficient cause appearing, it is ordered that the plaintiff's original Exhibits "A" and "G" which were introduced in evidence on the trial of the above entitled cause and plaintiff's Exhibits "B", "C", "D", "E" and "F", which were offered in evidence on the trial of the above entitled cause, and rejected by the Court, be by the Clerk of this Court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected

and considered together with the transcript of the record on appeal in this cause.

Dated at Tacoma as of the 29th day of August, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order to Transmit Original Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
Defendant. } No. 1933—C.

CERTIFICATE.

I, E. E. Cushman, Judge of the above entitled court, hereby certify that the accompanying documents are respectively plaintiff's Exhibits "A" and "G" which were introduced in evidence on the trial of the above entitled cause, and plaintiff's Exhibits "B", "C", "D", "E" and "F", which were offered in evidence on the trial of the above entitled cause, and rejected by the court, and are respectively the exhibits mentioned in the bill of exceptions herewith, and of which the said exhibits herewith form a part.

I further certify that the said original exhibits are herewith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal of the above entitled cause for the reason that the alleged forgery of the instruments con-

stituting said plaintiff's Exhibit "A" is an issue herein, and an inspection of the said exhibit will be aidful to the said Circuit Court of Appeals, and for the further reason that said exhibits are difficult of reproduction.

Done in open court this 29th day of August, 1912.

EDWARD E. CUSHMAN,  
United States District Judge, Western District  
of Washington.

Indorsed: Certificate: Filed in the U. S. District Court,  
Western Dist. of Washington. Aug. 29, 1912. A. W. Engle,  
Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
Defendant. } No. 1933—C.

#### ASSIGNMENT OF ERRORS.

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

##### I.

The Court erred in overruling plaintiff's demurrer to the defendant's second affirmative defense.

##### II.

The Court erred in rejecting the evidence offered by the plaintiff upon said trial in the following instances, to-wit:

A. In rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance as to the arrangements had between said McCoy and the United States relative to the payment by said McCoy of the bills he might incur in the performance of his duties for the Government.

B. In excluding and rejecting plaintiff's Exhibit "B".

C. In rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance that the vouchers sent in by said McCoy to the Department were regular and in the usual form and manner.

D. In excluding and rejecting plaintiff's Exhibit "C".

E. In rejecting and excluding portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance whether or not there was anything on the fact of the quarterly accounts or upon the individual vouchers or pay-rolls indicating any irregularity or fraudulent practice.

F. In rejecting and excluding plaintiff's Exhibit "D".

G. In permitting said M. P. McCoy to testify upon cross-examination regarding how much money he had expended legitimately for the Government between the year 1900 and the year 1909.

H. In permitting witness McCoy to testify upon cross-examination in substance that his letter of instructions from the Department advised the bank that he had authority to draw any money placed to his credit with the defendant bank as Special Disbursing Agent.

I. In permitting witness McCoy to testify upon cross-examination in substance that the letter of instructions to the defendant bank contained no limitation on the bank's authority to pay the witness money.

J. In permitting witness McCoy to testify upon cross-examination in substance that witness was authorized to draw any money placed to his credit in defendant bank on his own signature.

K. In rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance that wit-

ness McCoy had no authority from the Government to pay money or draw checks against his account with defendant bank except in payment of legitimate bills.

L. In rejecting and excluding plaintiff's Exhibit "E".

M. In rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance whether or not witness McCoy had worked for the Government or performed any services during the month of November, 1907.

N. In rejecting and excluding plaintiff's Exhibit "F".

O. In rejecting and excluding plaintiff's Exhibit "J".

### III.

The Court erred in granting defendant's motion for a non-suit of plaintiff's case at the conclusion of all of plaintiff's evidence after plaintiff's case had been re-opened.

### IV.

The Court erred in entering the final judgment of non-suit against the plaintiff and dismissal of said action.

WHEREFORE, The plaintiff prays that the judgment of the District Court be reversed.

W. G. McLAREN,  
United States Attorney.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA,  
                        *Plaintiff,*  
                        vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
                        *Defendant.* }  
                        } No. 1933—C.

PETITION FOR WRIT OF ERROR.

The plaintiff above named, the United States of America, feeling itself aggrieved by the judgment of the Court, made and entered in this cause on the 27th day of June, 1912, herein, comes now by W. G. McLaren, United States Attorney for the Western District of Washington, and petitions this Court for an order allowing it to prosecute a Writ of Error to the Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided.

W. G. McLAREN,  
United States Attorney for the Western  
District of Washington.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.  
Northern Division.*

## ORDER ALLOWING WRIT OF ERROR

Upon the motion of W. G. McLaren, United States Attorney for the Western District of Washington, and upon the filing of petition for Writ of Error and an assignment of errors;

IT IS ORDERED, That a Writ of Error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein.

WITNESS THE SIGNATURE OF THE HONORABLE  
EDWARD E. CUSHMAN, Judge of the above entitled Court,  
at Seattle, Washington, this 29th day of August, 1912.

EDWARD E. CUSHMAN, Judge.

Indorsed: Order Allowing Writ of Error. Filed in the  
U. S. District Court, Western Dist. of Washington. Aug. 29,  
1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA, }  
                                *Plaintiff,* }  
vs.                            }  
NATIONAL BANK OF COMMERCE, }  
a Corporation,                 *Defendant.* }  
                                    } No. 1933—C.

PRAECLYPE FOR RECORD.

*To the Clerk of the Above Entitled Court:*

You will please prepare at once transcript of the record in the above entitled cause on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and forward the same to the Clerk of that Court, including in the transcript the following papers necessary to the determination of the question to be passed on by said Circuit Court of Appeals:

1. Complaint filed December 22, 1910.
2. Answer filed February 11, 1911.
3. Plaintiff's demurrer to answer filed February 23, 1911.
4. Oral decision on demurrer to affirmative defense, filed September 21, 1911.
5. Order sustaining demurrer to first affirmative defense and overruling as to second, filed September 21, 1911.
6. Amended Answer, filed March 12, 1912.
7. Reply to amended answer, filed March 13, 1912.
8. Journal Entry March 13, 1912 (Journal 2, page 319-320) granting motion for non-suit.
9. Petition for new trial, filed March 22, 1912.
10. Order denying motion for new trial, filed June 27, 1912.
11. Judgment of non-suit, filed June 27, 1912.

12. Stipulation extending time for settlement of Bill of Exceptions, filed June 27, 1912.
13. Order extending time for settlement of Bill of Exceptions, filed June 27, 1912.
14. Stipulation extending time for settlement of Bill of Exceptions, filed July 17, 1912.
15. Order extending time for settlement of Bill of Exceptions, filed July 17, 1912.
16. Order extending time for settlement of Bill of Exceptions, filed August 24, 1912.
17. Stipulation authorizing filing of plaintiff's Exhibit "G", filed July 30, 1912.
18. Order authorizing Clerk to file plaintiff's Exhibit "G", filed July 30, 1912.
19. Motion to transmit exhibits with Bill of Exceptions, filed August 22, 1912.
20. Stipulation for transmission of original exhibits, filed August 22, 1912.
21. Order for transmission of original exhibits on writ of error, filed August 22, 1912.
22. Bill of Exceptions, filed August 29, 1912.
23. Certificate certifying Exhibits "A", "B", "C", "D", "E", "F" and "G", filed August 29, 1912.
24. Send plaintiff's Exhibits "A", "B", "C", "D", "E", "F" and "G" attached to certificate relating to them, filed August 29, 1912.
25. Assignment of Errors, filed August 29, 1912.
26. Petition for Writ of Error, filed August 29, 1912.
27. Order allowing Writ of Error, filed August 29, 1912.
28. Writ of Error, filed August 29, 1912.
29. Citation with Marshal's return, filed August 29, 1912.
30. Send original Writ of Error as well as include copy in transcript.
31. Send original Citation, as well as include copy in transcript.
32. This praecipe.

33. All indorsements of any kind whatsoever appearing on any of the above named papers.

B. W. COINER,

United States Attorney.

C. F. RIDDELL,

Assistant United States Attorney.

Indorsed: Praeipe for Record. Filed in the U. S. District Court, Western Dist. of Washington, September 13, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

*In the District Court of the United States for the Western District of Washington. Northern Division.*

UNITED STATES OF AMERICA,  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,

*Plaintiff,*  
*Defendant.*

} No. 1933.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,  
Western District of Washington—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 212 printed pages, numbered from 1 to 212, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by the praecipe of the attorney for the plaintiff, save and excepting Government's Exhibits "A", "B", "C", "D", "E", "F" and "G", separately certified and transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the record upon appeal in this cause, said exhibits being transmitted pursuant to the Order of the District Court made in the said cause August 29, 1912,

a copy of which order will be found on page 199 of said record, and that the same constitutes the record on appeal from the Order, Judgment and Decree of the District Court of the United States, for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit in said cause.

I further certify that I hereunto attach and herewith transmit the original Citation and Writ of Error in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript of the record on appeal is the sum of \$244.20, chargeable to the United States, and that the said sum will be included in my account against the United States for Clerk's fees for the quarter ending December 31, 1912.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 10th day of October, 1912.

(Seal)

FRANK L. CROSBY, Clerk.

*United States Circuit Court of Appeals for the Ninth Circuit Court.*

UNITED STATES OF AMERICA,  
Plaintiff in Error,  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
Defendant in Error. } No. 1933.

#### CITATION.

United States of America,  
Ninth Judicial Circuit—ss.

To the National Bank of Commerce, a corporation, and Messrs. Kerr & McCord, its attorneys, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in said circuit, on the 27th day of September, 1912, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, wherein the United States of America is plaintiff in error and the National Bank of Commerce, a corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 29th day of August, 1912, and in the one hundred and thirty-seventh year of the Independence of the United States of America.

(Seal)

EDWARD E. CUSHMAN,  
United States District Judge.

RETURN ON SERVICE OF WRIT.

United States of America,  
Western District of Washington—ss.

I hereby certify and return that I served the annexed CITATION on the therein named National Bank of Commerce, a corporation, by handing to and leaving a true and correct copy thereof with E. S. McCord, a member of the within named firm of Kerr & McCord, its attorneys, personally, at Seattle, in said District on the 30th day of August, A. D. 1912.

JOSEPH R. H. JACOBY, U. S. Marshal.  
By H. V. R. ANDERSON, Deputy.

August 30, 1912.

Fees \$2.12.

Indorsed: No. 1933. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plain-

tiff in Error, vs. National Bank of Commerce, a corporation, Defendant in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

*United States District Court, Western District of Washington.  
Northern Division.*

UNITED STATES OF AMERICA,  
*Plaintiff,*  
vs.  
NATIONAL BANK OF COMMERCE,  
a Corporation,  
*Defendant.* } No. 1933.

WRIT OF ERROR.

United States of America,  
Ninth Judicial Circuit—ss.

THE PRESIDENT OF THE UNITED STATES:

To the Honorable Judge of the District Court of the United States for the Western District of Washington, GREETING:

Because of the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and the National Bank of Commerce, a corporation, defendant, a manifest error hath happened, to the great damage of the said United States of America, plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, do command you, if judgment be herein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States

Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 27th day of September, 1912, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done thereon to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, this 29th day of August, 1912, and in the one hundred and thirty-seventh year of the Independence of the United States.

Allowed by:

(Seal)

EDWARD E. CUSHMAN,  
United States District Judge.

Attest:

A. W. ENGLE,

Clerk of the United States District Court,  
Western District of Washington.  
By F. A. SIMPKINS, Deputy.

Service of the within Writ of Error, and receipt of a copy thereof, is hereby admitted this 30th day of August, 1912.

KERR & McCORD,  
Attorneys for Defendant—National Bank of Commerce,  
a Corporation.

Indorsed: No. 1933-C. In the District Court of the United States for the Western District of Washington. United States of America, Plaintiff, vs. National Bank of Commerce, a corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 29, 1912. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

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IN THE  
**United States Circuit Court  
of Appeals**  
FOR THE  
**NINTH CIRCUIT**

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UNITED STATES OF AMERICA,  
*Plaintiff in Error,*  
vs.  
NATIONAL BANK OF COMMERCE  
OF SEATTLE, a corporation,  
*Defendant in Error.*

No. 2190

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Upon Writ of Error to the United States District  
Court for the Western District of Washington  
Northern Division.

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**Brief of Plaintiff In Error**

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**STATEMENT OF THE CASE.**

During the years 1907, 1908 and 1909 one M. P. McCoy was an examiner of surveys and special disbursing agent of the United States with head-

quarters at Seattle. McCoy's official duties required him to go into the field in various parts of the states of Washington, Oregon, Idaho and Montana and run over again one-tenth of the lines run by surveyors who made surveys of public land under contract with the government, in order to check up their work. (Record p. 58.) To pay for the expenses which he incurred, there were deposited with the defendant corporation, a national depository, various sums to the credit of M. P. McCoy as such special disbursing agent, which McCoy was to use solely for the purpose of making payment of the expenses incurred by him officially as aforesaid. He had his check book and drew various checks, signing them "M. P. McCoy, Examiner of Surveys and Sp. D. A." When he made a payment he was required to take the signature of the person he paid on a voucher and give him a check on said account in the defendant bank for that amount. (Record pp. 45-46.) McCoy sent in to the government each week a report covering his work for that week and every quarter submitted an expense account to which was attached the different vouchers covering the payments made by check on this government account (Record pp. 45-48). Every

three months the bank sent to Washington the cancelled checks covering the same time for which McCoy rendered his quarterly account (Record pp. 53, 70-71).

During part of the time in question the men he employed signed a monthly pay-roll when they received their checks for wages and the other payments for government expenses were evidenced by vouchers, in the manner before stated. This pay-roll was forwarded to the department like a voucher (Record pp. 46, 51-53).

McCoy went wrong and instead of doing the work on the surveys from 1907 to 1909 he falsified his reports to the government and executed fraudulent checks purporting to pay for work which was never performed (Record pp. 60-63). He forged vouchers for the amounts of the checks in the names of fictitious persons, issued the checks in the same names, forged the names of the fictitious payees to the endorsement of the checks, deposited the checks to the personal credit of the fictitious payee in some other bank (Record pp. 66, 67) which forwarded the same to the defendant bank. The defendant paid them. McCoy later checked

the money out of the account in the fictitious name, deposited the money in his personal account and used it (Record p. 47).

One W. G. Good, as special agent of the government, was finally sent out to investigate McCoy's work about September, 1909, and found that the services McCoy claimed to have rendered had never been performed; that the vouchers covering these checks in question were false and the person's name therein, fictitious (Record p. 97-100). At the time Good made his investigation, the fraudulent checks for the months of July and August, 1909, were still in the defendant bank and had not yet been sent to Washington (Record pp. 98-99). McCoy confessed, was indicted and plead guilty. Good, during the investigation, obtained from the bank the checks for the two months of July and August, 1909, notified the bank that they were all fraudulent, as he says, "gave them the history of the whole case," and returned the checks to the possession of the bank (Record pp. 118, 119).

On March 4, 1910, the United States Attorney for the Western District of Washington made a demand for the re-payment of the \$15,129.81 herein sued upon, attached to his demand a list of the

checks with their description and notified the defendant that its officers and attorneys would be allowed to inspect the checks (Record pp. 137, 147). The bank later sent an officer to inspect the checks and he did so (Record pp. 121, 122). The bank refused to repay the money and this action was instituted.

The defendant's answer set up two affirmative defenses, the second of which was to the effect that the deposit in this case was made in the usual and ordinary manner and it was not the duty of the defendant to inquire as to the name of the payee of McCoy's checks; that the checks bore his genuine signature and that the bank rendered monthly statements showing the amount of each check, both to the government and to McCoy, in conformity with the usual custom of bankers; that no complaint of the payment of such checks reached the bank until March 5, 1910; that it was the duty of the plaintiff to examine the account and to promptly notify the defendant of the alleged forgeries; that by reason of the failure to notify the defendant within a reasonable time, plaintiff was barred and estopped from starting this action (Record 14, 15). A demurrer to this affirmative defense was overruled

(Record p. 19) and defendant later in an amended answer repeated the same defense in an amplified form, adding that by reason of the failure to notify the bank of McCoy's fraud within a reasonable time the defendant had lost its right against the various banks through which the checks had been forwarded for payment and that therefore the government was estopped from bringing this action (Record 22,23). The Court at the close of the plaintiff's testimony granted a nonsuit, upon the theory that a tender to the bank of the fraudulent checks was a condition precedent to any cause of action (Record pp. 116-117, 122, 28).

#### SPECIFICATION OF ERROR.

##### I.

The Court erred in overruling plaintiff's demurrer to the defendant's second affirmative defense (Record pp. 13-19, 22-23).

##### II.

The Court erred in rejecting portions of the evidence of M. P. McCoy, given by deposition, in substance that his instructions were to pay the necessary expenses to carry out the examination of the different surveys (Record pp. 44, 151).

## III.

The Court erred in excluding and rejecting plaintiff's Exhibit "B," being the fraudulent vouchers corresponding to certain checks herein sued upon (Record pp. 49-52, 155-156, 90-92).

## IV.

The Court erred in rejecting portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance that the vouchers sent in by said McCoy to the Department were regular and in the usual form and manner (Record pp. 51-52, 156-157).

## V.

The Court erred in excluding and rejecting plaintiff's Exhibit "C," being certain quarterly accounts current covering the transactions evidenced by the checks here in suit (Record pp. 52-53, 157-158).

## VI.

The Court erred in rejecting and excluding portions of the evidence of M. P. McCoy, given by deposition, which evidence was in substance whether or not there was anything on the face of the quar-

terly accounts or upon the individual vouchers or pay-rolls indicating any irregularity or fraudulent practice (Record pp. 54, 159).

## VII.

The Court erred in rejecting and excluding plaintiff's Exhibit "D," being a quarterly account (Record pp. 55, 159).

## VIII.

The Court erred in permitting the witness, M. P. McCoy, to testify upon cross-examination regarding how much money he had expended legitimately for the Government between the years 1900 and 1909 (Record pp. 57, 58).

## IX.

The Court erred in permitting witness McCoy to testify upon cross-examination in substance that his letter of instructions from the Department advised the bank that he had authority to draw any money placed to his credit with the defendant bank as Special Disbursing Agent (Record pp 69, 70).

## X.

The Court erred in permitting witness McCoy

to testify upon cross-examination in substance that the letter of instructions to the defendant bank contained no limitation on the bank's authority to pay the witness money (Record pp. 81, 82).

## XI.

The Court erred in rejecting portions of the evidence of witness M. P. McCoy on re-direct examination, in substance that the witness had no authority from the Government to pay money or draw checks against the account in question with the defendant bank except in payment of legitimate bills (Record pp. 83, 186-187).

## XII.

The Court erred in rejecting and excluding plaintiff's Exhibit "E" (Record pp. 84, 85).

## XIII.

The Court erred in rejecting portions of the evidence of said McCoy, given by deposition, which evidence was in substance whether or not that witness had done any work for the Government or performed any services during the month of November, 1907 (Record pp. 85, 187).

## XIV.

The Court erred in rejecting and excluding plaintiff's Exhibit "F" (Record p. 85).

## XV.

The Court erred in rejecting and excluding plaintiff's Exhibit "J" (Record pp. 110-112, 124-137, 43-44).

## XVI.

The Court erred in granting defendant's motion for a nonsuit of plaintiff's case at the conclusion of all of plaintiff's evidence after plaintiff's case had been re-opened.

## XVII.

The Court erred in entering the final judgment of non-suit against the plaintiff and dismissal of said action.

## ARGUMENT.

The various questions presented by this record resolve themselves easily into practically three different heads only.

A. The error in the granting of the non-suit and dismissal of the action (assignments XVI. and XVII.) will be practically conclusive of this case.

B. In the event of a reversal, assignment numbered I, the error in overruling demurrer to the affirmative defense will only be material on a new trial.

C. All the other assignments of error numbered II. to XV. inclusive, relate to the admission or rejection of evidence and are of minor importance.

A.

THE MOTION FOR NON-SUIT SHOULD NOT  
HAVE BEEN GRANTED.

The following is an outline of the government's argument on this point:

The general theory upon which a recovery is had where money has been paid under a mistake of fact will be called to the attention of the court and then there will be noted so far as applicable to this case the various circumstances and principles under which a recovery might be denied,

First: That a tender to the bank of the cancelled checks was not necessary.

Second: The question of the possible influence of any negligence on the part of the government will be discussed in its various phases.

Third: It will be shown that the fact that these checks were made out to fictitious payees did not make them payable to bearer and is no defense, and there will be cited to the court, cases on all fours with the case at bar in which recovery was allowed, and one case in which a recovery was denied.

The general theory on which a recovery is had by a depositor from his bank when the latter has paid the depositor's check upon a forged endorsement, is that money paid or credited on a mutual mistake can be recovered. The contract relation between a depositor and a bank is such that the bank can be compelled to pay upon demand any written order of the depositor for money, but not otherwise, and that the bank may not charge against its depositor any check which has been paid by it where the bank obtains title to the paper over a forgery.

*United States vs. National Exchange Bank of Providence*, 214 U. S. 302, 53 L. Ed. 1006;

*First National Bank vs. Whitman*, 94 U. S. (4 Otto) 343, 24 L. Ed. 229;

*Shipman vs. Bank*, 126 N. Y. 318, 12 L. R. A. 791, 22 Am. State Reports, 821;

*Harmon vs. Old Detroit National Bank*

(Mich.) 116 N. W. 617, 17 L. R. A. N. S. 514;

*Onondaga County Savings Bank vs. United States*, (Circuit Court of Appeals, Second Circuit) 64 Fed. 703.

Unless therefore there is some fact or circumstance to take this case out of the general rule, the court was in error in granting the non-suit. For this reason the rest of the government's argument on this point resolves itself simply into a negation of the various objections and exceptions which might take the present case out of the general rule.

## I.

The learned trial court granted the non-suit on the theory that a tender of the cancelled checks to the bank at the time of the demand on the bank for the payment of the money here in suit, was a condition precedent to recovery. The court was of opinion that a tender of the checks to the prior endorsing bank was a condition precedent to any right of action by this defendant against the bank which was the prior endorser of this paper (Record 116-117) and that therefore, a tender of the checks was necessary in order to enable this defendant

bank to recover from the other banks. The court's position however is absolutely untenable and the premise on which he bases his argument has twice been considered by the United States Supreme Court.

*Leather Manufacturers' National Bank vs. Merchant's National Bank*, 128 U. S. 26, 32 L. Ed. 342;

*United States vs. National Exchange Bank*, 214 U. S. 302, 53 L. Ed. 1006.

In the Leather Manufacturers' Bank Case, the point was squarely before the court and it was held that the payee bank might recover of the prior endorser without any demand whatever and that the statute of limitations began to run immediately upon the payment, the court saying at page 35 (p. 344):

"One who by presenting forged paper to a bank procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration, which has once existed, fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment. *Espy vs. Bank of Cincinnati*, 85 U. S.

18 Wall. 604 (21: 947); *Gurney vs. Womersley*, 4 El. & Bl. 133; *Cabot Bank vs. Morton*, 4 Gray, 156; *Aldrich vs Jackson*, 5 R. I. 218; *White vs. Continental Nat. Bank*, 64 N. Y. 316.

Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment; and the money remains in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the Statute of Limitations begins to run, immediately upon the payment."

This language is quoted with approval in the case of *United States vs. National Exchange Bank*, 214 U. S. 302, 316; 53 L. Ed. 1006, 1011.

In the prior case of *Cooke vs. United States*, 91 U. S. (1 Otto) 389, 23 L. Ed. 237, the United States sued J. Cooke and others for eighteen counterfeit one thousand dollar bonds of the United States for which the government had paid them cash. It appears from the argument of counsel for J. Cooke & Co., 23 L. Ed. 240 that:

"These notes in question were surrendered to the officer selected by the United States to receive

and pay for them, and on such surrender were mutilated by the cancellation or punching out of the signature on the face of the notes, and otherwise defaced. And the Government not only has not returned the notes, but by its own acts has rendered itself unable to return and restore these obligations to us.

It has deprived us of the right of making reclamation upon the parties upon whom the notes, if they pass through our hands, were received.

The rule is, that the party to whom forged or counterfeit obligations are passed, must notify the party from whom they were received, immediately, and must tender to him the instruments themselves.

In this case no notification was given to the defendants until three weeks after the notes were received, and the notes themselves had been defaced and mutilated."

The objection also appears in 91 U. S. 395. This is the precise point which counsel raises in case at bar and was passed upon by the United States Supreme Court in the Cooke case in the following language:

"There have been other errors assigned upon the rulings made in the progress of the trial as to the admission of evidence. These need not be specially alluded to. It is sufficient to say that we think there is no error here. The same may be said as to the ruling of the court upon the punching or cancellation of the notes. If they were counterfeit, the cancellation could do no harm; for they were

worthless before. If they were genuine, they had already been cancelled by the payment."

The court in the Leather Manufacturers' Bank Case recognized a distinction between a suit by a depositor against his bank and a suit by that bank against a prior endorser and stated that a demand was necessary in the former case, but that not even that formality was required in the latter.

The question as to whether or not the demand must be accompanied by a tender of the checks themselves has been squarely passed upon in the case of *United States vs. Onondaga County Savings Bank*, 39 Fed. 259, which was affirmed by the Circuit Court of Appeals, Second Circuit, in *Onondaga County Savings Bank vs. United States*, 64 Fed. 703, where the court say at page 705:

"The refusal of the defendant in error to return the drafts has in no way prejudiced the plaintiff in error, or deprived it of any remedy against those who defrauded it."

The ground on which the court allowed the non-suit was therefore untenable.

## II.

As to negligence: it appears from the testimony

in this case that McCoy deposited these checks in other banks where he gave a false name and that defendant bank paid them, relying on the endorsements of the other banks. It does not appear that this defendant made any investigation whatever to determine the authenticity of the endorsements. It also appears that an examination of the cancelled checks and the bank's statement would not have revealed the irregularities of McCoy.

The bank itself having been negligent in failing to make any investigation to determine the authenticity of the endorsements, cannot urge negligence of the Government as a defense.

*Leather Manufacturers' Bank vs. Morgan,*  
117 U. S. 96, 112, 29 L. Ed. 811;

*New York Produce Exchange Bank vs.  
Houston*, 169 Fed. 787-788;

*First National Bank vs. Fourth National  
Bank*, 56 Fed. 967, 971.

In the latter two cases the language of Mr. Justice Harlan in *Leather Manufacturers' Bank vs. Morgan* was cited to this very point:

"Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot

receive a credit for the amount of those checks, even if the depositor omitted all examination of his account."

Moreover, the negligence of the bank through which this paper was received is imputable to the defendant bank. In *Harmon vs. Old Detroit National Bank*, (Mich.) 116 N. W. 617, 17 L. R. A., N. S. 514, 519-520, the court say:

"In this case the defendant took no precautions before paying the warrant to ascertain the identity of the payee. It did not show that it paid the warrant to the payee named therein. It evidently relied upon the identification made by the bank in Denver, Colorado, where the warrant was cashed, and whether that bank took the requisite precaution we do not know. It would naturally excite suspicion that a check drawn in Detroit, payable to a corporation in Chicago, on a bank in Detroit, should be presented to a bank in the distant city of Denver. It was clearly the duty of the Denver bank to take proper means to assure itself that it was paid to the proper party; in other words, to take proper means to identify the payee. 2 Morse, Banks & Banking, Sec. 446b; *Ellis vs. Ohio Life Ins. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610. The court in that case said:

'Where the negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent

disregard of this duty, retain the money received upon a forged instrument.'

The negligence of the Denver bank is imputable to the defendant."

Were that not sufficient for the purposes of this case, the Government could urge on the court the principle that an examination by the depositor of his pass book and checks is all the law requires, and that where such examination, as in this case, would have disclosed no irregularities to the government, the record need not show whether such examination was or was not made.

*Leather Manufacturers' Bank vs. Morgan*, 117 U. S. 96, 117, 29 L. Ed. 811, 819, where the court say:

"From *Welsh vs. German-American Bank*, it is clear that the comparison by the depositor of his check book with his pass book would not necessarily have disclosed the fraud of his clerk; for the check when paid by the bank was, in respect of date, amount, and name of payee, as the depositor intended it to be, and the fraud was in the subsequent forgery by the clerk of the payee's name. As the depositor was not presumed to know, and as it did not appear that he in fact knew, the signature of the payee, it could not be said that he was guilty of negligence in not discovering, upon receiving his pass book, the fact that his clerk or some one else had forged the payee's name in the indorsement."

Counsel attempted to put into this record facts indicating that the Government by some independent investigation could have determined whether or not McCoy was conducting his business for the Government in a regular manner, but such facts, even if established, cannot avail the defendant, for the depositor owes the bank no duty even to search for or discover forged endorsements on his bills or checks (*National City Bank vs. Third National Bank*, 177 Fed. 136, 140) nor to conduct an independent investigation in order to prevent the fraud of a dishonest agent (*National Bank of Commerce vs. Tacoma Mill Company*, 182 Fed. 1, 12-13).

The Government was not negligent in failing to discover these forgeries for the additional reason that the Government is not presumed, any more than any other depositor, to know the signatures of the payees of its checks.

*United States vs. National Exchange Bank*,  
214 U. S. 302, 317, 53 L. Ed. 1006, 1012.

*Leather Manufacturers' Bank vs. Morgan*,  
117 U. S. 96, 117; 29 L. Ed. 811, 819.

It appears also that the witness, Good, when conducting his investigation, gave immediate notice to the defendant bank of the forgery of the checks.

The court will notice that Good's investigation occurred about September, 1909; that he got the cancelled checks for two months from the defendant bank and after McCoy had plead guilty, he notified the defendant bank that the checks were fraudulent, "gave them the history of the whole case," and returned to the bank the checks they had given him, which the bank thereupon forwarded to the Government and claimed credit for them in their accounts. It appears therefore that notice was given by the Government through its agent when it first had knowledge of the transaction and that irrespective of any question of negligence as a defense in this case, the facts show that the Government, through its officers has in every respect exercised reasonable prudence. We know of no other possible phase of the question of negligence which could be urged as a defense to this case.

### III.

These checks being made payable to fictitious payees were not, therefore, payable to bearer.

In a number of cases where the same question presented by this record, or a similar question, was under discussion, some stress was laid on the

argument that where an agent without the knowledge of the principal, procures the checks to be made to a fictitious payee, they are therefore payable to bearer, and that being payable to bearer, the bank has paid them according to their tenor and the signature of the payee is not a forgery. The Government believes this contention to be unsound and there is certainly a strong line of authorities against it.

The argument of plaintiff on this point is briefly as follows:

The Government admits that a check is payable to a fictitious payee whether the payee is an actual person or not if the maker of the paper intends that it shall never be paid to the payee named. It is, however, the intention of the maker which governs. The United States was the maker of these checks under the well recognized exception to the general rule that where a Government agent signs a contract with his own name, but in his official capacity on behalf of the Government and pursuant to the authority of the United States, he does not become a party to the contract, but the contract is that of the Government, and finally that his knowl-

edge and intention as an agent, cannot in this case be imputed to the Government for the reason that McCoy obtained his knowledge that these payees were fictitious while he was engaged in a scheme to defraud the Government. Upon this argument the Government concludes that the checks were not payable to a fictitious payee within the knowledge of the maker and therefore were not payable to bearer and McCoy's endorsement of them was forgery.

An additional argument on this phase of the case is found in the fact that the regulations of the Treasury Department, which have the force of law and of which the court takes judicial notice, prohibit the execution of commercial paper by a disbursing agent in the name of a fictitious payee. The authority of every agent of the Government is a delegated authority and parties dealing with agents of the Government must at their peril determine the extent of the agent's authority. The rejected exhibits in this case, being the vouchers for payments, show the method adopted by the Government for the disbursements of this public money and would have shown the bank, had it inquired into the authority of the

agent, that it was the purpose and intention of the Government that no check should be made payable to a fictitious payee or to bearer, but that the signature of the payee must correspond with the signature on the voucher taken by the disbursing agent.

The Washington statute, being Section 3,400 of Rem. & Bal. Code (Laws 1899, page 342, Section 9) provides that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable."

That the payees on these checks were both fictitious and non-existing persons we think admits of no question. The Government contends, however, that it is the intention of the maker of the paper which governs and determines whether or not the instrument thereby becomes payable to bearer. The authorities indeed, are practically uniform to the effect that where the maker intends the paper to be paid to a real person, or does not know that the payee is a fictitious or non-existing person, the instrument does not thereby become payable to bearer.

The statute above quoted is declaratory of the

common law on this subject and the following decisions are therefore in point.

*Harmon vs. Old Detroit National Bank*, (Mich.) 116 N. W. 617, 17 L. R. A., N. S. 514, 519 and cases cited;

*Armstrong vs. National Bank*, 46 Ohio State 512, 6 L. R. A. 625, 15 Am. State Reports 655, 22 N. E. 866;

*Shipman vs. Bank*, 126 N. Y. 318, 12 L. R. A. 791, 22 Am. State Rep. 821, 27 N. E. 371;

*Chism vs. First National Bank*, 96 Tenn. 649, 32 L. R. A. 778, 54 Am. St. Rep. 863, 36 S. W. 387.

Even in the case of *Snyder vs. Corn Exchange National Bank*, (Penn.) 70 Atlantic, 876, which is an authority against the government's recovery in this case, it is said at pages 878 and 879:

“The intent of the drawer of the check in inserting the name of a payee is the sole test of whether the payee is a fictitious person.”

Although these checks were signed by McCoy “M. P. McCoy, Examiner of Surveys and Sp. D. A.” the Government was the maker of these checks, under the familiar exception to the general rule of agency that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and

not personal, even where they are signed by the agent personally.

*Jones vs. LeTombe*, 3 Dallas 383, 1 L. Ed. 647;

*Armour vs. Roberts*, 151 Fed. 846, 852;

*Hodgson vs. Dexter*, 1 Cranch 345, 2 L. Ed. 130;

*Garland vs. Davis*, 4 How. 131, 148; 11 L. Ed. 907;

29 Cyc. 1446-7.

In *Jones vs. Le Tombe*, *supra*, the consul general of the French Republic drew a bill of exchange and signed it "LeTombe, the Consul General." The defendant was held not personally liable on this contract on the ground that it had been made by him on account of the Government and that credit had been given to the Government as an official engagement.

In *Hodgson vs. Dexter*, *supra*, the defendant, then late Seeretary of War, was sued for breach of a covenant in a certain lease in that the buildings on the premises had been destroyed by fire. In the body of the lease the covenantor was described as "Samuel Dexter, of the same place, Secretary of War," the covenant purported to run from "the

said Samuel Dexter, for himself, his heirs, executors, administrators and assigns," and the indenture was signed "Samuel Dexter, Seal." Of this indenture the Chief Justice says at pages 363-365 (L. Ed. 136-137) :

"It appears, from the pleadings, that congress had passed a law authorizing and requiring the President to cause the public offices to be moved from Philadelphia to Washington; in pursuance of which law, instructions, by the President, were given, and the offices belonging to the department of war were removed; that it became necessary to provide a war office, and that for this purpose and no other, the agreement was entered into by the defendant, who was then at the head of this department. During the lease, the building was consumed by fire.

It is too clear to be controverted, that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the government, are public and not personal.

They enure to the benefit of, and are obligatory on, the government; not the officer.

A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account. This subject was very fully discussed in the case of *Macbeath vs. Haldimand*, cited from 1 Term Reports; and this court considers

the principles laid down in that case as consonant to policy, justice and law.

The plaintiff has not controverted the general principle, but has insisted, that, in this case, the defendant has, by the terms of his contract, bound himself personally.

It is admitted that the house was taken on account of the public, in pursuance of the proper authority; and that the contract was made by the person at the head of the department, for the use of which it was taken; nor is there any allegation, nor is there any reason to believe, that the plaintiff preferred the private responsibility of the defendant to that of the government; or that he was unwilling to contract on the faith of government. Under these circumstances, the intent of the officer to bind himself personally must be very apparent indeed, to induce such a construction of the contract.

The court can perceive no such intent. On the contrary, the contract exhibits every appearance of being made with a view entirely to the government.

The official character of the defendant is stated in the description of the parties. This, it has been said, might be occasioned by a willingness in the defendant to describe himself by the high and honorable office he then filled. This unquestionably, is possible, but is not the fair construction to be placed on this part of the contract, because it is not usual for gentlemen, in their private concerns, to exhibit themselves in their official character.

\* \* \*

The court is unanimously and clearly of opinion,

that this contract was entered into entirely on behalf of government, by a person properly authorized to make it, and that its obligation is on the government only.

Whatever the claims of the plaintiff may be, it is to the government, and not to the defendant, he must resort to have them satisfied.

Judgment affirmed with costs."

In *Garland vs. Davis, supra*, the former Clerk of the House of Representatives had placed with plaintiff a verbal order for the publication of a volume of the United States Laws. The Clerk died, his successor in office violated the contract and gave it to another person. The plaintiff sued in tort. The plea was *non assumpsit*. In remanding the case upon the technicality of pleading the court in referring to the merits say at pages 148-149 (L. Ed. 915) :

"But that being a promise confessedly on the whole evidence made by the original defendant, or his predecessor, as a public agent, if now rendering final judgment, we should probably, in that view of the record (no tort having been put in issue or found by the verdict), be obliged to decide against the original plaintiff on the merits, because public agents are not usually liable on mere contracts or promises made in behalf of their principals."

The following cases are cited to the same effect but have not been examined by the Government:

*Macbeath vs. Haldimand*, 1 Term Rep. 172;  
*Unwin vs. Wolseley*, 1 Term Rep. 674;  
*Myrtle vs. Beaver*, 1 East, 135;  
*Rice vs. Shute*, 1 East, 579;  
*Brown vs. Austin*, 1 Mass. Rep. 208;  
*Freeman vs. Otis*, 9 Mass. Rep. 272;  
*Sheffield vs. Watson*, 3 Caines, 69;  
*Fox vs. Drake et al.*, 8 Cowen, 191; 2 Dall., 444;  
*Osborne vs. Kerr*, 12 Wend., 179;  
*Story on Agency*, secs. 302-308;  
*Lord Palmerston's Case*, 3 Brod. & Bing. 275.

The Government therefore is the maker of these checks and it is its intention which governs or the intention of its agent acting within the scope of his authority, but in this case McCoy was acting in fraud of the Government in violation of his authority and his knowledge that the payees were fictitious and his intention to defraud his principal cannot be imputed to it.

This court has squarely passed on that proposition in *National Bank of Commerce vs. Tacoma Mill Co.* (1910) 182 Fed. 1, 11:

“But, having used such reasonable and proper

precautions, he cannot be held liable for the deceitful and dishonest acts of his agent, for the simple and very potent reason *that the agent is not his agent for such purposes.* As to them, the agent is acting wholly without the scope of his authority. To many details of an extensive business, it is impossible for the owner or manager to give personal attention.” (Italics ours.)

Other authorities to the same effect are numerous.

*Central Coal & Coke Co. vs. Good*, 120 Fed. 793, 798 and cases cited;

*Mulroney vs. Royal Insurance Co.*, 163 Fed. 833, 835-6, and cases cited;

*Lilly vs. Hamilton Bank*, 178 Fed. 53, 56-58;

*American Surety Co. vs. Pauly*, 170 U. S. 133, 156-159, 42 L. Ed. 977, 986-987.

In the Lilly case the court say:

“It is a general rule of the law of agency that a principal is bound by the knowledge of his agent. In the case of *The Distilled Spirits*, 11 Wall. 367 (20 L. Ed. 167), Mr. Justice Bradley said that the rule ‘is based on the principle of law that it is the agent’s duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty.’ That the rule has certain exceptions was conceded by Justice Bradley. He said, for example, that when it would be unlawful for an agent to communicate his knowledge to his principal, as when it has been acquired confidentially as attorney for a former client in a prior transac-

tion, the reason of the rule ceases, and his principal ought not to be bound by the agent's secret and confidential information. That case did not call for any expression of opinion as to whether there is not also another exception, when the agent is engaged in committing an independent fraudulent act for his own benefit. On principle it seems it should be so. If the reason of the general rule is that the law presumes the agent has discharged his duty of communicating his knowledge to his principal, there seems to be no just ground for denying the second exception above suggested, for it cannot be fairly presumed that an agent will communicate to his principal a fraud intended for his own and not his principal's benefit. Another reason for the general rule has been stated, however, and that is that where one in transacting the business of his principal is committing a fraud for his own benefit he is not acting within the scope of his authority as his principal's agent, and therefore that his knowledge of the fraud is not imputable to his principal. Speaking of the general rule that the principal is held to know all that his agent knows in any transaction in which the agent acts for him, the Circuit Court of Appeals for the Sixth Circuit, in *Thomson-Houston Electric Co. vs. Capitol Electric Co.*, 65 Fed. 343, 12 C. C. A. 645, said:

'This rule is said to be based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. Such presumption cannot be indulged, however, where the facts to be communicated by the agent to the principal would convict the agent of an attempt to deceive and defraud his principal. The truth is that, where an

agent, though ostensibly acting in the business of the principal, is really committing a fraud for his own benefit, he is acting outside the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it.'

Such was also the view expressed by the Circuit Court of Appeals for the Eighth Circuit in *Bank of Overton vs. Thompson*, 118 Fed. 798, 56 C. C. A. 554. And in *Allen vs. South Boston R. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185, it was said:

'The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. \* \* \* There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of the principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such fraud bears some analogy to a tort willfully committed by a servant for his own purpose, and not as a means

of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established.'

Speaking on the same subject in *American Surety Co. vs. Pauly*, 170 U. S. 133, 156-159, 42 L. Ed. 977, 986-987, Mr. Justice Harlan says:

"The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

In *Henry vs. Allen*, 151 N. Y. 1, 10 (36 L. R. A. 658), the court recognized the general rule. But after observing that it rested upon the agent's duty to disclose such facts to his principal, it held that one of the exceptions was that where the agent was 'engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose.'

To the same effect are *Benedict vs. Arnoux*, 154 N. Y. 715, and *Kettlewell vs. Watson*, L. R. 21 Ch. Div. 685, 707. In the latter case it was said that the presumption arising from the duty of the agent to communicate what he knows to his principal 'may be repelled by showing that, whilst he was

acting as agent, he was also acting in another character, viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character.'

In *Commercial Bank vs. Cunningham*, 24 Pick. 270, 276 (35 Am. Dec. 322), which involved the question whether certain notes held by a bank were to be deemed to have been made for the accommodation of a firm, one member of which was a director of the bank at the time the notes were taken, it was held that the knowledge of the latter, although a director, was no proof of notice to the corporation, 'especially as he was a party to all these contracts, whose interest might be opposed to that of the corporation.'

This principle is reaffirmed in *Innerarity vs. Merchants' National Bank*, 139 Mass. 332, 333 (52 Am. Rep. 710), in which the court said:

'While knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating.'

citing

*Kennedy vs. Green*, 3 Myl. & K. 699;  
*Cave vs. Cave*, L. R. 15 Ch. Div. 639;

*Re European Bank*, L. R. 5 Ch. 358;

*Re Marseilles Extension Railway & L. Co.*, L. R. 7 Ch. 161;

*Atlantic National Bank vs. Harris*, 118 Mass. 147;

*Loring vs. Brodie*, 134 Mass. 453.

In *Terrell vs. Branch Bank at Mobile*, 12 Ala., 502, 507, the question was as to the liability of the maker of a note executed in blank and delivered by him to a director of a bank to be filled up with a certain sum and to be used in the renewal of a note of the maker already held by the bank. The director (Scott) filled up the note for a larger amount and had it discounted for his own use, he acting as one of the directors when the discount occurred, but concealing the facts from the other directors. It was contended that the knowledge of Scott as director of the circumstances under which the note was made and offered for discount, his connection with the directory, and his presence when it was discounted by the bank, were in law notice to the other directors of the facts. The supreme court of Alabama said:

'It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended—he was contracting with the bank through his associates in the directory—he was borrowing, not

lending, its money—though a member of the board and present too, it cannot be supposed that he co-operated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan.'

In his treatise on Equity Jurisprudence, Pomroy says:

'It is now settled by a series of decisions possessing the highest authority, that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed.' Vol. 2, Sec. 675.

Further citation of authorities would seem to be unnecessary to support the proposition that if Collins gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests. In our judgment the circuit court of appeals (38 U. S. App. 279, 72 Fed. Rep. 483, 18 C. C. A. 656), correctly held that plaintiff's right of action on the bond was not lost because its president, Collins, made to the defendants false representations as to the cashier's

honesty; and that when two officers of a corporation have entered into a scheme to purloin its money for the benefit of one of them,

'In pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the bank, but in reality to consummate said scheme, and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers, and without express authority—the corporation being ignorant of the fraud—the officers are not, in thus consummating such theft, the agents of the corporation.'

In *Eccles & Co. vs. L. & N. R. Co.*, 198 Fed. 898, 900-905, a very recent case, it seems that one Bywater, an agent of the defendant, schemed with other persons to defraud his company and prospective shippers, through the execution and negotiation of fraudulent bills of lading. Persons who were defrauded by purchase of these fictitious bills of lading sued the company, claiming that Bywater in perpetrating the fraud was an agent of the company. The court, however, drew this clear distinction, that when an agent is performing a non-delegable duty or where his principal induces third parties to rely on his representations, then the principal will be bound by the acts of the agent committed in fraud of the principal, but that where an agent is not performing a non-delegable duty or where the principal

places him in such a position as to induce third parties to rely on his representations, the principal will be bound by his acts even when committed in fraud of the principal. The court's decision of this point will be found on pages 900-905 and the rule summed up at pages 904-5 in the following language:

"It seems quite apparent that the exception to the general rule is recognized both in the federal court and in the Alabama court. It does not apply in either forum to cases in which the principal is charged with the performance of a duty to the person injured, the performance of which he undertakes to delegate to an agent, who negligently or willfully fails to perform it. In such case liability upon the principal ensues, not upon the idea of notice, but because the duty the agent failed rightly to perform was the non-delegable duty of the principal, the nonobservance of which he could not excuse to third persons by saying that he had intrusted its performance to his own agent.

The case at bar is not of this class. If an inquiry had been made of Bywater by plaintiff as to the validity of the bills of lading involved in the suit before taking them, and Bywater, in response to such inquiry which it was the defendant's duty to have answered, with knowledge of their infirmity, had falsely represented them to be genuine or had fraudulently concealed their infirmity from the inquirers, the defendant, being under a duty to disclose such invalidity to the prospective holder, would have been liable for the failure of its agent, though

without knowledge of such infirmities except through him. This was the case of the warehouseman decided by Judge Shelby.

*Commercial Nat. Bank vs. Nacogdoches Compress & Warehouse Co.*, 133 Fed. 501, 66 C. A. 375.

On the contrary, in the case at bar no inquiry was made by the plaintiff of Bywater as to the validity of any of the bills of lading which are the basis of the suit. Neither Bywater nor the defendant is shown to have had any knowledge of their existence before they were negotiated to plaintiff, nor was any action required or taken by him or it with reference to them."

It will be seen therefore that McCoy's acts in the instant case in the execution and negotiation of the checks in question were not performed in the scope of his employment but in violation thereof and in fraud of his principal. His knowledge, and his acts and intentions are not imputable to this plaintiff and the checks therefore are not made payable to bearer.

Under the principle announced in the last quotation which we believe to be good law, the Government would be bound by McCoy's signature in executing this paper. The bank had a right to rely on it and if McCoy's signature on these checks were the prominent cause of the loss in this case the

Government could not recover. McCoy, however, was not the agent of the Government to receive payment or to make any representations as to the authenticity of the signature or identity of the payee. So that his knowledge is not imputable to the Government and does not make these checks payable to bearer and the Government is not bound by his fraudulent intention when he made the checks payable to fictitious persons. His endorsement of them was a forgery and the bank is liable.

The foregoing principle, namely, that the knowledge of the agent who is engaged in a fraud of the principal is not the knowledge of the principal is, we believe, by the great weight of authority and in reason applicable to the instant case.

*Harmon vs. Old Detroit National Bank* (Mich.), 116 N. W. 617, 17 L. R. A., N. S. 514;

*Chism vs. First National Bank*, 96 Tenn. 649, 32 L. R. A. 778, 54 Am. St. Rep. 863, 36 S. W. 387;

*Shipman vs. Bank*, 126 N. Y. 318, 12 L. R. A. 791, 22 Am. St. Rep. 821, 27 N. E. 371;

*Armstrong vs. National Bank*, 46 Ohio State 512, 6 L. R. A. 625, 15 Am. St. Rep. 655, 22 N. E. 866.

In the Harmon case the court found that the

plaintiff did not intend the check in question to be made to a fictitious person, but intended the payee to be real. Plaintiff was, however, imposed upon by the fraud of his clerk, who knew of the fictitious character of the payee.

In the Chism case the plaintiff was imposed upon by a third party who represented himself as the agent of a non-existing person and procured the plaintiff to deliver to him a check drawn in favor of this non-existing person. The third party thereupon forged the name of the fictitious payee to an endorsement of the check and procured its payment to himself.

In the Armstrong case the facts are practically identical with those in the Chism case. In none of these cases was the question raised that the knowledge of the agent was the knowledge of the principal. In the Harmon case, plaintiff's own clerk was engaged in defrauding him. In the Chism case and in the Armstrong case, plaintiff adopted as his agent to deliver the check to the supposed payee, the person who was defrauding him. In allowing a recovery in those three cases the court necessarily adopted the principle that the knowledge of the

agent is not the knowledge of the principal or it would have found for the defendant.

The facts in the Shipman case resemble in the main those in the Harmon case, and the question was squarely raised and decided by the court:

"The indorsement of the names of the fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery, by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged. Bedell, of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals."

As sustaining the above quotation the court cite:

*Frank vs. Chemical National Bank*, 84 N. Y. 209;

*Weisser vs. Denison*, 10 N. Y. 68;

*Welch vs. German-American Bank*, 73 N. Y. 424;

*Cave vs. Cave*, L. R. 15, Ch. Div. 643, 644.

The case of *Snyder vs. Corn Exchange National Bank* (Penn.), 70 Atlantic 876, apparently following

the doctrine of *Phillips vs. Mercantile National Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, is authority to the contrary. The New York and Pennsylvania courts attempted to distinguish the doctrine of those cases from the Shipman case upon the ground that in the latter case the signature on the check was the manual act of the principal induced by the fraud of the guilty agent, while in the Snyder case and in the Phillips case the guilty agent had authority to execute the paper and did so on behalf of his principal. We fail to see, however, why the delegation of authority to execute the instrument should render the knowledge of the guilty agent imputable to the principal in one case when the fraud of the agent inducing the manual act on the principal does not have the same result.

There is another consideration, however, which precludes the application of the doctrine of the Phillips and Snyder cases to the decision of the case at bar, and that is the fact that M. P. McCoy was by law prohibited from making any check payable to bearer and this defendant is chargeable with knowledge of that fact.

The regulations of the Departments of Government made pursuant to law have the force of law and are judicially noticed by the court.

*Caha vs. United States*, 152 U. S. 211, 38 Ed. 415;

*Cosmos Exploitation Co. vs. Gray Eagle Iron Co.*, 190 U. S. 301, 47 L. Ed. 1064.

Section 5153 U. S. R. S. provides:

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; \* \* \*,"

This defendant is a national depository, and as such received the deposit in question pursuant to the above section.

Pursuant to the same authority which has existed in practically the same form since its enactment as Section 45 of the Act of June 3, 1864, Secretary Shaw on April 16, 1903, by Department Circular No. 49, promulgated the following regulation, which is still in force:

"6. If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required by departmental regulations, or if any reason exists for suspecting fraud,

the office or bank on which such check is drawn will refuse its payment.

The same authority on December 7, 1906, in Department Circular No. 102, quoted Sections 3600 and 5488 U. S. R. S. and promulgated the following regulations:

"Any check drawn by a disbursing officer upon moneys thus deposited must be in favor of the party, by name, to whom the payment is to be made, and payable to 'order,' with these exceptions:

(1) To make payments of amounts not exceeding \$20, (2) to make payments at a distance from a depository, and (3) to make payments of fixt salaries due at a certain period; in either of which cases any disbursing officer may draw his check in favor of himself, or 'order,' for such amount as may be necessary for such payment, but in the first and last named cases the check must be drawn not more than two days before the payments become due. Any disbursing officer or agent drawing checks on moneys deposited to his official credit, must state on the face or back of each check the object or purpose to which the avails are to be applied, except upon checks issued in payment of individual pensions, the special form of such checks indicating sufficiently the character of disbursement. If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required, or if any reason exists for suspecting fraud, the office or bank on which such check is drawn will refuse its payment.

Such statement may be made in brief form, but

must clearly indicate the object of the expenditure, as, for instance, ‘pay,’ ‘pay roll,’ or ‘payment of troops,’ adding the fort or station, ‘purchase of subsistence,’ or other supplies; ‘on account of construction,’ mentioning the fortification or other public work for which the payment is made; ‘payments under \$20,’ etc.

Any check drawn by a United States disbursing officer payable to himself, or ‘order,’ ‘to make payments of amounts not exceeding twenty dollars each,’ under the provisions of this circular must bear indorsed thereon the names of the persons to whom the amount drawn is to be paid, or be accompanied by a list, or schedule, made a part of the check, containing the same information.”

Section 310 U. S. R. S. in part reads as follows:

“\* \* \* And each disbursing officer shall make a like return of all checks issued by him, and which may then have been outstanding and unpaid for three years or more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, number, and amount for which it was drawn, and, when known, the residence of the payee.”

Section 3648 is in part:

“No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment.” \* \* \*

Every person who dealt with or accepted a check

of McCoy was charged with the knowledge that as a Government agent his powers were delegated and therefore limited by law and was also chargeable with the knowledge of the statutes and the regulations promulgated pursuant thereto and which have been quoted above. Referring to Section 3648 the Supreme Court in *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169, 176, say:

"The transactions by which these drafts were accepted was in direct violation of this law, and of the limitations which it imposes upon all officers of the Government. Every citizen of the United States is supposed to know the law, and when a purchaser of one of these drafts began to make the inquiries necessary to ascertain the authority of their acceptance, he must have learned at once that, if received by Russell, Majors or Waddell, as payment, they were in violation of law, and if received as accommodation paper, they were evasions of this law, and without any shadow of authority."

Quoting further from the same case:

"Whenever negotiable paper is found in the market purporting to bind the Government, it must necessarily be by the signature of an officer of the Government and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the Government.

When this inquiry arises, where are we to look for the authority of the officer?

The answer, which at once suggests itself to one

familiar with the structure of our Government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. \* \* \*

It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The Government cannot be held to a more rigid rule, in this respect, than a private individual.

If A authorizes B. to buy horses for him, and to draw on him for the purchase money, B cannot buy land and bind A by drawing on him for the price. Such a doctrine would enable a man, in private life, to whom a well defined and limited authority was given, to ruin the principal who had conferred it. So it would place the Government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a Department to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit. No Government could protect itself, under such a doctrine, by any statutory restriction of authority short of an absolute prohibition of the use of all commercial paper."

The following cases accept the authority of The Floyd Acceptances for the doctrine that all persons dealing with commercial paper of the Government

must at their peril ascertain the authority of the public agent to execute it:

*Marsh vs. Fulton County*, 10 Wall. 676, 683;  
*The Mayor vs. Ray*, 19 Wall. 468, 478;  
*Merchant's Bank vs. Bergen County*, 115 U. S. 384, 390-391;  
*Pine River Logging Co. vs. U. S.*, 186 U. S. 279, 291.

The questions arise, therefore, whether McCoy had authority to issue a check payable to a fictitious payee and if not, whether the bank either is chargeable with knowledge of that fact or whether it, in dealing with his paper, must at its peril ascertain whether the payee was a real or fictitious person.

We believe it admits of no question that McCoy lacked authority to issue a check payable to a fictitious payee. The provisions of Department Circular No. 102 of December 7, 1906, are to the effect that *any* check drawn by a disbursing agent *must* be in favor of the party, *by name*, to whom the payment is to be made and payable to "order," with certain exceptions. In the exceptional cases the agent is allowed to draw the check in favor of himself or "order." This language does not require construction. All it needs is enforcement and McCoy's

lack of authority is too plain to admit of question.

Under the decisions of *Caha vs. United States*, *supra*, and *Cosmos vs. Gray Eagle Iron Co.*, *supra*, the Department regulations have the force of law which everybody is presumed to know. The bank, therefore, is chargeable with notice of McCoy's lack of authority and under the doctrine laid down in *The Floyd Acceptances*, *supra*, not only this defendant bank, but every person dealing with McCoy's paper, is required at his peril to ascertain the agent's authority to execute the same. They were required to know as a matter of law, that if the name of the payee on McCoy's check was not the name of the real person who rendered the service or delivered the article for the use of the Government, it must be the name of McCoy. A requirement by the bank that the payee be identified and the authenticity of his signature established would have prevented the loss to the Government. Such precautions are no more and no less than the contract which the defendant bank and every other bank dealing with this paper engaged to perform. It is the violation of that duty which is the proximate cause of the loss in this case and the defendant is liable.

One other consideration may be urged on the court to prevent a recovery in this case and that is section 3363 of Rem. and Bal. Washington Code, being the Laws of 1907, page 31, Section 1, which provides that:

"No bank or trust company shall be liable to a depositor for the payment by said bank or trust company of a forged or raised check, unless within 60 days after the return to the depositor of the voucher of such payment, such depositor shall notify the bank or trust company that the check so paid was raised or forged."

The trial judge however, and we believe correctly, held that the state statute of limitations could not be effective as against the Government, in accordance with the rule laid down in *United States vs. Thompson*, 98 U. S. 486, 25 L. Ed. 194. In fact the Circuit Court of Appeals for the Second Circuit has allowed recovery by the Government in a case where the forgery of the payee's name was not discovered for two years. That fact was held to be no defense.

*Onondaga County Savings Bank vs. United States*, 64 Fed. 703.

We know of no further objections that could be made to the recovery by the Government in this

case and submit that the granting of the non-suit was error.

B.

THE COURT ERRED IN OVERRULING THE DEMURRER TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE IN THE ORIGINAL COMPLAINT (Record, pp. 13-14), THE SAME BEING PRACTICALLY THE FIRST AFFIRMATIVE DEFENSE IN THE AMENDED COMPLAINT (Record, pp. 22-23).

The foregoing discussion contains all that could be said on this question and the court is now sufficiently informed of the contention of the Government and we believe it appears from those principles that no fact set up in the alleged affirmative defense constitutes any bar to this action.

C.

*ERRORS IN ADMISSION AND REJECTION  
OF EVIDENCE.*

These errors group themselves under two heads, First, Those in which the court permitted McCoy to testify to the contents of writings of which copies could be produced, and,

Second, The exclusion of McCoy's oral testimony and the exhibits relating to the method whereby the vouchers were prepared and showing the purposes for which the checks were drawn.

The error in permitting McCoy to testify to the contents of written instruments is one too plain to require the citation of authority.

The error in excluding McCoy's testimony and in rejecting the vouchers as exhibits depends not so much on principles of law as it does upon the materiality as a matter of fact of these exhibits to the plaintiff's case. The plaintiff submits that if this case shall be retried, this testimony should be presented to the jury. It is necessary to an understanding of the whole transaction. It places before the jury facts which the defendant bank could have had upon inquiry and with the knowledge of which they should therefore be charged. This line of evidence undoubtedly would have great weight with a jury in determining whether or not the manner in which the Government conducted its business was such that this defendant in failing to require an identification of the payee has caused the loss of the money sued for and should therefore respond in damages.

The judgment of the United States District Court in this cause should be reversed and the case remanded for a new trial.

Respectfully submitted,

B. W. COINER,  
*United States Attorney.*

C. F. RIDDELL,  
*Assistant United States Attorney.*

IN THE

# United States Circuit Court of Appeals

FOR THE  
NINTH CIRCUIT

UNITED STATES OF AMERICA

*Plaintiff in Error*

vs

NATIONAL BANK OF COM-  
MERCE OF SEATTLE, a Cor-  
poration,

*Defendant in Error.*

No. 2190

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Upon Writ of Error to the United States District Court  
for the Western District of Washington,  
Northern Division.

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## BRIEF OF DEFENDANT IN ERROR

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### STATEMENT

During the years 1907, 1908, and 1909, M. P. McCoy was an Examiner of Surveys and Special Disbursing Agent for the United States. The National Bank of Commerce of Seattle was a

government depositary. The United States deposited with the National Bank of Commerce large sums of money at various times during the years to the credit of "M. P. McCoy, Examiner of Surveys and Special Disbursing Agent." McCoy was directed by letter from the Treasury Department to leave his signature with the National Bank of Commerce, to draw checks upon that bank, and to sign the checks "M. P. McCoy, Examiner of Surveys and Special Disbursing Agent." This letter of instructions was shown by McCoy to the bank, and it contained no limitation upon his right to check against the account; his authority under said letter of instructions to draw the money upon his own order was unlimited. (Record, pp. 69, 81, 82.)

Between October, 1907, and August 31st, 1909, upon checks so drawn, the bank paid out \$15,129.-81, as stated in the complaint. The checks in question were drawn by McCoy to fictitious payees. He endorsed the name of the fictitious payee upon the check, and caused the check so endorsed to be deposited in another bank and the proceeds placed to his account under another fictitious name. The names that he used in opening up accounts in other

banks were F. M. Clark and J. D. King. (Record, p. 65.)

McCoy made weekly reports to the government, and monthly and quarterly rendered vouchers for all of his expenditures. The bank every month rendered a statement to the government and to McCoy as to the condition of the account and quarterly returned to the government all the vouchers that it had paid upon McCoy's order. The government was thus advised monthly and quarterly by the bank of the status of the account and the government was given the names of the persons to whom the checks were drawn, and the reports of McCoy to the government, also made quarterly, gave in detail the expenditures and the purposes for which the expenditures were made.

The testimony shows that all of the payees were fictitious and that McCoy, the agent of the government, had systematically, during the entire time above mentioned, attempted to defraud the government and had been unfaithful to his trust. He was arrested in September, 1909, and convicted, served his sentence in the penitentiary and had been paroled, and his testimony is practically the

sole testimony upon which the government relies. The evidence shows that he had never been pardoned nor had his civil rights been restored to him.

During the period that the checks in question were drawn McCoy had honestly performed certain work for the government in the examination of surveys, and had expended honestly for the government from \$1000 to \$4000 (Record, pp. 61, 77, 79) and expenditures to this amount were paid from the money that McCoy fraudulently had in his possession. All of the checks drawn upon the defendant bank bore the genuine signature of McCoy, in whose name the deposit was made.

The government in its complaint insists that the money was paid out by the bank on these checks wrongfully and without authority and seeks to recover from the bank the money so paid out.

The government failed to make any investigation or inquiry as to the accounts of its agent from 1907, when the frauds commenced, until 1909; failed to ascertain, as it could easily have done, that McCoy was acting fraudulently and that he was not doing the work nor expending the money that he represented he had expended, when a slight

inquiry would have disclosed the fraud and prevented its continuance, and would have prevented the loss which has been sustained by some one through the negligence of the government and through the fraud of its agent.

The plaintiff not only failed to discover the forgeries or to notify the bank of any irregularities in the accounts, but failed to make a demand for the money until six months after the forgeries were discovered. The failure of the government to examine the returns made by the bank and to report errors in time was a cause of the successful practice or continuance of the frauds and was necessarily detrimental to the defendant. The injury could not have occurred had the government performed its duty and examined the returns and had verified their truthfulness.

The defendant in its answer pleaded the statute of the State of Washington which provides that when a bank renders a statement of account to a depositor such depositor must within sixty days notify the bank of any errors or forgeries, and if the depositor fails to so notify the bank within such time that no suit can be prosecuted. The demurrer to this defense was sustained.

The defendant also contended that the deposit was made by the government in the name of McCoy in the usual and customary manner as deposits are ordinarily and customarily made by an individual creditor was established; that it became the duty depositor and that the relation of debtor and of the defendant to pay the checks drawn by McCoy against said deposits and that such checks were paid from time to time as the same were presented and that the checks were, under the negotiable instrument act of the State of Washington, made payable to bearer. That statements of account were rendered monthly to McCoy and to the government and that the duty was imposed upon the government to examine such accounts within a reasonable time and to report any discrepancies; that the government failed to do this for an unreasonable length of time; failed to notify the bank of any forgeries, or any irregularities in the statements; that no complaint was made of any improper payment of the checks and that the failures of the plaintiff to promptly notify the defendant of the forgeries or fraud resulted in damage to the defendant in the amount of the checks and prevented it from protecting itself against future

forgeries or fraud, and that the plaintiff was estopped to recover from the bank on account of its negligence and dilatoriness in investigating the acts of its agent that caused the fraud and in promptly notifying the defendant thereof. Defendant also contended that a considerable part of the money that was so fraudulently drawn by McCoy was expended by him in the payment of legitimate claims against the government. (Record, pp. 12, 22, 23.)

After the testimony of the plaintiff had been introduced the defendant made its motion for a non-suit, whch was granted by the Court, and the government has appealed from the action of the Court in granting the non-suit and dismissing the action.

#### ARGUMENT

While the plaintiff has assigned numerous errors, the principal error upon which it relies seems to be the action of the Court in granting the non-suit, so that as counsel for plaintiff have seen fit to base their argument for the most part upon the action of the Court in granting the non-suit, we shall follow in our argument the course adopted

by counsel for plaintiff; and a discussion of the action of the Court in granting a non-suit brings before this Court the entire record in the case.

#### FAILURE TO RETURN CHECKS.

One of the grounds stated by the Court in granting the motion for non-suit was that the government had failed, upon the discovery of the forgeries or frauds to return the checks to the defendant, and the Court said:

"As the matter rests in my mind now, it seems to me like a difficult point to get over in this case would be that the checks were not returned. The right to recourse against the banks through which these checks came to the defendant bank would, according to ordinary banking rules, depend upon the return of the endorsed paper, and the government is held to observe the business rules which obtain with business men in business transactions, and the government is not allowed to assert a right while committing a wrong. If it was wrong to withhold these checks, it is not right to make the defendant bank pay." (Record, p. 113.)

And again, on page 115 of the Record, the Court said:

"The case of United States against National Exchange Bank, 214 U. S., 302, decides one point, and that is that the rule requiring prompt notice to be given of the invalidity of commercial paper is an exception to the general rule, the general rule

being that where money is paid by mutual mistake the mistake can be corrected and the matter adjusted according to the rights of the parties. Now the exception that is made in the law is where notice of a mistake is not promptly given and after a lapse of reasonable time, if no notice is given, the party who has made the mistake is protected against bringing up the matter to be readjusted.

Now the Supreme Court decided that the exception does not apply except in those matters where the party who should give the notice is in a position to have knowledge of the mistake. It does not apply as against the government when checks are paid on fraudulent indorsement of payees, because the government does not know the payees, does not know their signatures, is not in a position so as to have the information so as to give notice of a mistake of that kind; therefore the rule does not apply. The argument to be drawn from that is that, in accordance with other decisions of the Supreme Court of the United States, the government is bound by the business rules that apply to the handling of commercial paper. As said by Judge Miller, the government itself is as much interested, if not more interested, than anybody else, in the value of confidence in handling commercial paper, and for that reason it is as much bound as private individuals are to the reasonable rules of business that are prescribed and followed for the protection of people who repose confidence in handling commercial paper. The defendant was not obligated to pay any of these checks except on presentation at its banking house in Seattle by the payee, and upon being satisfied of his identity, but in accordance with commercial usages, it acted with reasonable business prudence in taking these checks, accompanied by an endorsement which guaranteed or

warranted the genuineness of the signature of the payee; I mean taking these checks from another bank; and having done so it is entitled to be treated fairly in the matter of protecting its rightful recourse against the prior endorsers. I think essential to that right was the return of the checks or a tender of them. If I am not greatly mistaken in my understanding of banking business and the rules of law, this defendant upon being informed that the payees named in these checks were fictitious persons, and the endorsements of their names on the checks were forgeries, and that the checks were in the custody of the United States District Attorney, and that permission would be given to inspect them and take copies therefrom, would not on receipt of that notice or that kind of information have any legal ground to go to another bank from which the check had been received with guarantee and say: 'Here, that guarantee of yours has caused me to lose money and I require you to pay back the money that I paid on this check;' I don't believe the defendant bank could go to another bank and make a demand of that kind on that kind of showing or that state of facts. It would have the right to take the check and throw it down on the counter and require the money to be returned to it. I will grant the motion for a non-suit."

The government not only failed to return the alleged forged paper to the defendant, but retained the same until the trial of this case and introduced the fraudulent checks as evidence therein. If the defendant had sought to maintain an action against the banks from whom it received these checks, we

fail to see how such action could have been successfully maintained without the introduction of the checks in evidence. The evidence of these checks would have been indispensable to the successful maintenance of an action against the banks that received the money from the defendant. It could not be shown on the trial of such case that the checks had been lost or destroyed, but it would have appeared that the checks were in existence in the hands of the government that refused to surrender them, and with the checks admitted to be in existence and in the hands of the government any such action against the other banks would necessarily have failed.

But whether or not the Lower Court was right in its view as to the necessity of the return of the checks would not affect the correctness of its action in granting the non-suit if such action was right and supported by other principles of law. But we think that the position of the Court was clearly right.

Any action that the defendant would bring against the other banks would be necessarily based upon the liability of the collecting banks upon their endorsement of the checks; the question of the

genuineness of the checks would be one of the pivotal questions in any such suit and we are utterly unable to determine how such action could be sustained without the production of the alleged forged paper. The endorsing bank would become liable upon its endorsement which guaranteed the genuineness of the paper. The proof of the endorsement and of the lack of genuineness of the paper could not be sustained, it seems to us, without the production of the paper which the government has withheld up to this time and still refuses to turn over to the defendant bank.

The general rule is that the party to whom forged or counterfeit obligations pass must notify the party from whom they were received immediately and must tender to him the instruments themselves, "and the party receiving such notes must examine them as soon as he has opportunity and return them immediately." If he does not, he is negligent, and negligence will defeat his action.

*Cooke vs. U. S.*, 91 U. S., 395.

*Gloucester Bank vs. Salem Bank*, 17 Mass.,

"One who has received such counterfeit bills or notes in payment of his debt must return, or offer to return them in reasonable time or he will forfeit his rights to recover the amount of them from the payer."

*National Exchange Bank vs. United States,*  
151 Fed., 405.

In the case of the *United States Bank vs. Bank of Georgia*, 10 Wheat., 333, Mr. Justice Story said:

"If this doctrine be applicable to ordinary cases it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore, to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will, therefore, presume a damage, actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons, received in payment of a debt, there has been a qualification ingrafted on the general doctrine that the notice and return must be within a reasonable time, and any neglect will absolve the payer from responsibility."

The case cited by counsel of *United States vs. Onondaga Savings Bank*, 39 Fed., 259, is based upon the decision in the case of *United States vs. Central Bank*, 6 Fed., 134, but the Court in *National Ex-*

*change Bank vs. United States*, 151 Fed., 402, holds that the case of *Cooke vs. United States*, 91 U. S., 359, is authority for the contention that there must be an immediate notice of the discovery of the forgery and a return of the documents.

If the defendant in this case had brought an action against the Seattle National Bank, through which bank some of the checks were paid, what sort of an action would it have been? Would it have been one sounding in tort or one based upon contract? Manifestly it must be an action upon the contract of endorsement upon the check, and as there were numerous checks, possibly passing through numerous hands, it must be apparent that the production of the check must be made to the Seattle National Bank before the return of the money and no suit could be successfully maintained with these checks in existence and not produced at the trial. Had the action been one in tort, the statute of limitation would be three years. This suit was not commenced until December, 1910, more than three years after a large part of the checks had been paid by the National Bank of Commerce; so that if defendant, as suggested in the Onondaga case had a remedy apart from the

check the statute of limitation had already run before notice of the forgeries was given by the government to the National Bank of Commerce.

Counsel also cite the case of *Leather Manufacturers National Bank vs. Merchants' National Bank*, 128 U. S., 26, but that case does not touch upon the rule that it was the duty of the government to return the checks immediately upon the discovery of the forgeries.

#### FICTITIOUS PAYEES.

But it is immaterial whether the lower Court was correct in giving one reason for granting the motion for non-suit if his judgment can be sustained upon any ground. This Court will bear in mind that M. P. McCoy, Examiner of Surveys and Special Disbursing Agent, was the party in whose name the deposit was made upon the books of the National Bank of Commerce. His signature was furnished to the National Bank of Commerce by the direction of the Secretary of the Treasury; the bank was notified that McCoy was the only person authorized to draw checks upon that account; he was clothed by the government with authority to issue checks upon this fund; the government ap-

pointed him as its agent to issue negotiable paper and to place the same in circulation. McCoy affixed his genuine signature to each of the checks in controversy; he made the checks payable to fictitious payees and endorsed the checks in the names of the payees and through the agency of other banks succeeded in getting the money into his own possession.

"A check is a bill of exchange drawn on a bank, payable on demand. Except as otherwise herein provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

2d Rem. & Bal. Code, Sec. 3575.

"A bill of exchange is payable to bearer: 'When it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable.'

2d Rem. & Bal. Code, Sec. 3400, Sub-div. 3.

"Where the drawer of a check intended to use the name of payee and did use it, as that of a person who should never receive the check nor have any right to it, such payee, though an existing person, was a fictitious one within the negotiable instruments act of May 16, 1901, making a check payable to bearer, if payable to the order of a fictitious or non-existing person, and such fact is known to the person making it so payable."

*Snyder vs. Corn Exch. Nat'l Bank*, 70 Atl., 876.

"As the payee had no interest and it was not intended he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person the holder may declare and recover upon it as a bill payable to bearer."

*Snyder vs. Corn Exch. Bank, supra.*

In the case of *Phillips vs. Mercantile National Bank of New York* (140 N. Y., 556; 35 N. E., 982; 23 L. R. A., 584,) the Cashier of the National Bank of Sumpter, S. C., had authority from it to draw checks or drafts upon the Mercantile National Bank of New York, where it had an account. He drew checks upon that bank making them payable to the order of existing persons, but without their knowledge, and then endorsed the checks in their names to a firm of stockholders ~~holders~~ in New York, who collected them from the Mercantile Bank. The Receiver of the Sumpter Bank brought suit against that bank to recover back the amounts which it had paid on Bartlett's checks, on the ground that the

endorsements of the names of the payees were forgeries. It was held that there could be no recovery because the checks had been made payable to fictitious persons, even though the names adopted were those of existing persons, and were therefore to be regarded as having been made payable to bearer and intended for delivery to ~~stockholders~~<sup>brokers</sup> in New York. This having been the intent of Bartlett, who had authority from his bank to draw the checks, his intent—so far as the New York Bank was concerned—was said to have been the intent of his bank and that whatever he did in drawing and delivering the checks was to be regarded as its act. In the course of its opinion the Court in that case said:

“Whether endorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee’s name, but that act did not affect the title or rights of the defendant.”

In this case it cannot be successfully maintained that McCoy did not know at the time he drew the checks that they were made payable to fictitious persons. It is true that he intended to perpetrate a fraud, but the statute does not say that the drawer of the check shall have knowledge of the ficti-

tious or non-existing payee, but the fact must be known to the person making the check so payable. The statute does not limit the case to drawers of checks or makers of negotiable paper, but goes farther and applies not only to the maker but to the person who has the power to draw the instrument and to put it into circulation.

Counsel on page 23 of their brief contend that the United States was the maker of these checks. In a sense that is true; but the statute goes farther and makes the paper payable to bearer if the fact of the fictitious payee is known to the person making it so payable. But we do not agree with counsel that the drawer of the check, within the meaning of the rule as to fictitious payees, was the United States. We contend that the drawer of the checks was M. P. McCoy, Examiner of Surveys and Special Disbursing Agent. When the government placed the deposit in his name it parted with the title to the money so deposited, and it became the money of McCoy so far as the legal title was concerned and the relation of debtor and creditor was established between the bank and McCoy as the agent of the United States.

In the case of *United States vs. National Ex-*

*change Bank*, 45 Fed., 163, a party feloniously and by false identifications succeeded in procuring a check from the postmaster of Milwaukee; the check was made payable to the party entitled to receive the money, but it was delivered to a party not entitled to it, the postmaster acting in good faith in issuing the check and delivering it to such imposter. The bank paid the check and paid it to the identical person to whom the postmaster intended it to be paid. In that case the postmaster kept his account in the same way that McCoy kept his account with the National Bank of Commerce. He went with the imposter to the bank and identified him, and upon such identification the bank paid the check. Subsequently the government brought suit against the bank for the recovery of the money, and the Court held that the bank was not liable for the reason that the money was paid to the person to whom the postmaster intended it should be paid.

In this case the bank paid the money to the person that McCoy intended should receive it. McCoy put the paper into circulation and through his acts, representing the government, caused the money to be paid to the wrong person. The Court

held that the bank was not in fault and that the government was not necessarily in fault and therefore allowed the loss to fall where chance placed it, viz: upon the government.

The case of *Hermon vs. Old Detroit National Bank* (116 N. W., 617; 17 L. R. A., N. S., 514) cited by counsel, distinguishes the case of the *United States vs. National Exchange Bank*, 45 Fed., 163. In that case the Court says:

"In that case, the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was, of course, with the drawer and not with the drawee. To render that case applicable to this it should have appeared that the proper officer of the railroad company went to the bank and identified the payee."

And in the same case the Court says that the statute in question relating to fictitious payees applies only in cases where the drawer knowingly draws the check to the order of a fictitious payee. But in the *Harmon* case the Court recognized the distinction that we are endeavoring to present, *i. e.*, that McCoy and the postmaster occupy similar legal positions: both the agents of the government; both had the deposit placed in their names; and in the *Harmon* case the Court clearly recognized the

authority of the postmaster, who was only a special agent of the government, to draw the check and identify the payee, or to make the check payable to bearer, and that by doing so he relieved the bank of any liability for paying it to the wrong person. McCoy, in drawing the checks, was acting in the line of his duties and had the right to draw checks upon the deposit of the government to which he had the legal title, and there is no reason that occurs to us why a different rule should prevail in the case of the government from the rule that does prevail against private individuals. If the agent acts within the scope of his powers the government is necessarily bound by his acts. When the government enters into the business of dealing in negotiable paper it becomes bound by the laws regulating the issuance of negotiable paper to the same extent and in the same way that a private individual is bound. It is subject to the same rules and the same regulations that control private individuals. In its sovereign capacity it is free from suit without its consent and the statute of limitations and laches do not bind it; but when it becomes a party to a negotiable instrument it is bound exactly like other parties. The duty of giving notice of pro-

test, of making demand, and various other duties imposed by the law merchant have been held to apply to the United States.

In the case of *Cooke vs. United States* (91 U. S., 395,) the Court says:

"Laches is not imputable to the government in its character as sovereign by those subject to its dominion. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the dominion of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange it must use the same diligence to charge the drawers and endorsers that is required of individuals, and if it fails in this its claim upon the parties is lost. Generally in respect to all the commercial business of the government, if an officer ~~specially~~ charged with the performance of any duty and authorized to represent the government in that behalf, neglects that duty and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fails in this, it fails in the performance of its duties and must be charged with the consequences that follow such omissions in the commercial world."

Would it be seriously contended that if a private corporation had deposited money in the de-

fendant bank to the credit of its agent, and authorized him to draw checks against the fund, that he would not have the authority to draw a check to a fictitious payee? As between himself and his principal he might not, but as between the bank and himself manifestly he would. The principal that clothes its agent with the authority to so use his power as to perpetrate fraud must bear the loss if fraud be perpetrated, rather than the innocent party; and if McCoy, at the time he issued the checks intended to have the payees fictitious persons, then it seems to us that the checks were made payable to bearer and the bank was under no responsibility whatever in the premises.

Upon page 46 of brief of counsel for plaintiff is cited *Caha vs. United States* (152 U. S., 211,) and the case of *Cosmos Company vs. Gray Eagle Iron Company*, (190 U. S., 301,) to the effect that the regulation of any department of the government has the force and effect of law.

The cases cited do not hold this, but hold that the regulations are a part of the public records of which the courts will take notice in the trial of cases and that proof of such regulations will not be required. We do not understand the decisions to

go to the extent of holding that these regulations are the same in effect as a statute of the United States.

But the formalities with which these checks were issued were known to the government and the checks were received by the government at stated intervals during the time it was doing business with the National Bank of Commerce and no protest or objection was ever made as to the particular requirements of the checks. If the checks did not comply with the regulations the government should have objected; not having objected we think it must follow that they were waived.

But the checks were drawn by McCoy, who testified that he presented a letter from the Treasury Department to the National Bank of Commerce authorizing the bank to honor his checks, without conditions or limitations, and if any regulations to the contrary were in force the special letter of McCoy would have modified those regulations. The government clothed McCoy with the power to draw this money without any limitations, and there was no proof offered that the bank ever received any regulations. But even if the regulations were received, that would not alter the status

of the parties. The regulations construed as a whole require that the checks should state the purpose for which they were drawn, but this was never insisted upon.

As Judge Hanford said in his opinion (Record, p. 111) :

"The obligation of this defendant was to receive, safely keep and disburse public money according to law and regulations. The bank was not required to exercise supervision over the disbursing officers or to insure the government against embezzlement or loss of funds by misappropriation or for expending money for improper purposes. The duty of the bank was to pay the checks that were properly drawn by an authorized person, a person authorized to draw them, and pay the money to the payees or to the order of the payees named in the check. The bank could not know and was not required to know whether the payments were proper payments. It had to know that the payments were made as authorized by the checks. I think you are loading this case up with unnecessary matter in endeavoring to prove that these payments were fraudulent to the extent of being drawn for services that were not rendered or supplies that were not furnished. The bank did not have to inquire about them and was not in a position to know. The bank was in a position to know that the payees who presented the checks or got the money or indorsed them were properly identified."

Now if the payee was a fictitious person then it was the intention of McCoy, who drew the check, that the bearer should receive the money.

Counsel refer to the Floyd Acceptances, 7 Wall., 666. As we read that case it does not support the contention of counsel. In that case the Secretary of War accepted a bill of exchange, contrary to the laws of the United States and for the accommodation of the drawer, no power being vested in the Secretary of War to accept drafts for accommodation. The same case, however, recognizes the right of the Secretary of War, or other officer of the government, although there may not be a statute specially authorizing it, to issue bills of exchange in order to transfer money from one point in the United States to another, or elsewhere. The power to make such transfers is incident to the exercise of other constitutional provisions, and if the officer draws a bill of exchange within the scope of his powers it then partakes of all of the incidents of ordinary negotiable paper and the good faith of its issuance cannot be inquired into. In that case the court says:

"It is true that when once made, by a person having authority to make it, in any given case, it is not open to the same inquiries, in the hands of a third party, that ordinary contracts are, as to the justice, fairness and good faith which attended its origin, or any of its subsequent transfers, but, in reference to the authority of the officer who makes

it, to bind the government, it is to be judged by the same rule as other contracts.

The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing of a bill of exchange is the appropriate means of doing that which the department or officer having the matter in charge has the right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty and his right and authority to effect such an object is always open to inquiry, and if they be found wanting, or if they be forbidden by statute, then the draft or acceptance is not binding upon the government."

Floyd Acceptances, 7 Wall., 666.

In this case it cannot be questioned that McCoy was clothed by the government with the power to draw checks in the conduct of his business, and the Treasury Department furnished his signature to the defendant bank and directed the bank to honor his checks on the fund. He had the power to issue checks in the transaction of his business and in the ordinary way and his actions in drawing the checks

were recognized over a long period of years by the government itself.

### RECIPROCAL DUTIES BETWEEN BANK AND DEPOSITOR.

But whether this court recognizes the authority of McCoy to draw bills of exchange or checks payable to fictitious payees or not, still the action of the lower court in granting a non-suit was clearly correct for other reasons. We have insisted that the money was deposited to McCoy's credit and that the relation of debtor and creditor existed between McCoy as agent and the bank and that McCoy had authority to check on it without limitations or conditions, as he said in his testimony. But for the sake of argument assume that the money deposited to McCoy's credit at all times belonged to the government. Then it must follow that the relation of debtor and creditor existed between the United States and the defendant bank. And, as was said in the case of *Cooke v. United States, supra*, when the government enters into commercial transactions it abandons its sovereignty and becomes bound by the ordinary

usages and customs of commercial business and becomes bound by the rules regulating and controlling reciprocal obligations existing between a bank and its depositors. Among these obligations is the duty of the bank to furnish periodical statements of the condition of the account to the depositor. This is partly for the protection of the depositor and partly for the protection of the bank.

"It has long been the usage of banks to give out passbooks to their customers, in which the latter are credited with their proper deposits. These passbooks are sent in as occasion may seem to demand, often periodically and by request of the bank as well as upon the volition of the depositors, and are posted or statements returned with them along with the paid checks or vouchers, showing the condition of the depositor's account upon the books of the bank. It matters little whether the passbooks are sent in voluntarily or by request of the bank to be posted—the purpose and effect of the statements rendered by the bank in connection therewith are the same. They not only afford means whereby the depositor may discover errors to his prejudice, but furnish evidence in his favor in the event of dispute or litigation with the bank. They serve to protect him against the carelessness or fraud of the bank. The right thus accorded by banks to frequent accountings in this manner, so that the depositor may keep informed as to the condition of his account, as it appears upon the books of his depositary, is one of such manifest advantage that it entails a correlative duty upon

the depositor. It requires of him an examination of the account rendered, and, if errors or omissions become apparent, it is then incumbent upon him to bring them to the attention of the bank, by returning his passbook for correction, or by other convenient method. Otherwise his silence will be regarded as an admission that the entries as shown are correct."

*National Bank of Commerce v. Tacoma Mill Company*, 182 Fed., 6.

"The depositor cannot, therefore, without injustice to the bank, omit all examination of his account when thus rendered at his request. His failure to make it or have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a passbook."

*Leather Manufacturers' Bank v. Morgan*,  
117 U. S., 96.

In the *Tacoma Mill Company* case, *supra*, the entire subject of the correlative duties between bank and depositor is considered and the authorities reviewed, and the court says:

"It being the duty of the depositor to examine the statements of his bank when periodically balancing his passbook, it must follow that he is charged with knowledge of what those statements contain, whether he makes the examination in person or through an agent designated for the pur-

pose. Logically, also, he must know the state of his own accounts, if regularly and honestly kept. He is not bound to know what a dishonest clerk may have inserted therein, contrary to the fact and with a purpose of deceiving and defrauding him, but he would be bound to know what the legitimate facts or entries would disclose if followed to their natural sequence in the exercise of ordinary business care and alertness. That is to say, if legitimate entries and the manner of their entry in books of account or books of business memoranda would be suggestive of other facts, or would lead to further inquiry before an ordinarily prudent man, acting in business concerns, would be satisfied, then the principal must know what the inquiry would result in if the information at hand were followed to its natural conclusion."

The doctrine of the above mentioned case is in line with the principles of the leading decisions of the United States Supreme Court and other courts.

Now let us apply the foregoing principles of law to the facts in this case. McCoy was the agent of the government; he rendered to the government weekly, monthly and quarterly statements; sent to the government forged payrolls, forged vouchers and forged receipts for a period of more than two years. His duties were to examine in the field one-tenth of the actual surveys of various town-

ships of the public domain and he was required to and did send in to the government reports, maps, drawings, and field notes of his work. The slightest examination or inquiry on the part of the government would have immediately disclosed his fraudulent practices and would have prevented a continuation of them, and would have rendered it impossible for him to have succeeded in defrauding either the government or the bank. He was constantly in the city of Seattle and sent his reports to the government as to his field work and of his expenditures in doing the work from Seattle; he sent in reports covering his field work in Washington, Montana and Idaho, giving the names and post office addresses of the fictitious persons whom he claimed to have employed. With the vast army of secret service men employed by the government it would seem that it was the grossest carelessness on the part of the government not to have discovered, for considerably more than two years, that McCoy's maps and field notes were made up without his ever having gone upon the ground himself. An inquiry addressed to any of the local employes of the government in the land department, the treasury department, or the legal

department, would have enabled the government to discover that his whole course of conduct was saturated with fraud.

Moreover, the defendant bank paid the checks drawn by McCoy upon his bank account, made out in his handwriting and signed by his guaranteed signature; paid them, however, through other banks. His account with the bank was balanced each month and a statement of the same furnished to him, and a statement furnished to the Treasury Department. Every three months all of the vouchers drawn by him were forwarded by the bank to the government and were retained by the government, as well as the statements, without question or protest. The government was charged with the money that McCoy drew and acquiesced in his method of doing business. No protest was ever made by the government either as to the form in which the checks were drawn or the fact that in many instances they failed to state the purpose for which they were drawn; and it was at all times within the power of the government to have discovered, by the exercise of even ordinary diligence, his fraudulent practices.

Had the government exercised this ordinary

diligence promptly, then no damage would have resulted, except as to the earlier fraudulent acts. It was the duty of the government to exercise at least ordinary diligence in investigating the acts of its agent, and such investigation would unquestionably have led to the discovery of the fraud.

The government did not do this, and now seeks to compel the bank, that acted in good faith and with due diligence, to save it harmless against the loss brought about by its own negligence, and which could not have happened had it been diligent.

Moreover, the statutes of this state provide that in case of forged checks, notice must be given to the bank within sixty days after the return of the vouchers to the depositor, otherwise no suit can be brought for the recovery of money paid out on forgeries. The statute is as follows:

“No bank or trust company shall be liable to a depositor for the payment by said bank or trust company of a forged or raised check, unless within sixty days after the return to the depositor of the voucher of such payment, such depositor shall notify the bank or trust company that the check so paid was raised or forged.”

It is contended by plaintiff's counsel that this statute can have no application to the United States, citing cases that hold that state statutes of limitation have no application to the United States. This statute is not in the nature of a statute of limitations but is one that is simply a recognition of the common law doctrine that a depositor must promptly verify his statements of account or otherwise his right of action shall cease. It does not undertake to fix the time within which a suit may be brought and is not a statute of limitations but one that regulates the reciprocal duties between a depositor and his bank. It is a reasonable provision and is one that is enforced against individual depositors, and no reason appears to us why it should not apply to the government. When the government enters into the relation of depositor with a bank in any particular state the statute becomes a part of the contract between the depositor and the bank and is binding upon the depositor, whether that depositor be the government or an individual, to the same extent as though it had been written into the contract.

Judge Hanford in ruling upon the demurrer (Record, p. 17) clearly expressed the general rule of

law and while he held that the statute did not apply did hold that the rule of law expressed in the statute had substantially the same force without the statute. The following is his language:

"There may be good ground for holding that the statutes that have been cited are not applicable or controlling, but without any statute the rule of honest, fair dealing between contracting parties applicable to this case, is that bankers must bear losses from paying bad checks. When a check is presented for payment, the banker has a right to know, to be assured before paying, that the person demanding payment is the identical person entitled to receive the money. If a check is written payable to a person, or supposed person, or to his order, the bank is not obliged to pay that check until the holder identifies himself as the payee, or endorsee and offers satisfactory proof of the genuineness of every endorsement thereon. That is a natural right incidental to a banker's liability for making a payment to a person having no right to demand it. Now, tracing that same rule a little further, where the bank has been deceived and has paid a check which ought not to have been paid, early information of the error is necessary to preserve the right of recourse against whomsoever may be primarily responsible for the error and the depositor is the one best qualified to discover errors, so that there is a presumption that he will, upon inspection of checks that have been paid, discover a bad check if there is one, and he is obligated to be vigilant and prompt to report errors. Therefore, where there is a running account between a depositor and a bank, and monthly statements are made to the depositor, with a surrender

of his checks that the bank has paid, according to the rule of honesty and fair dealing the depositor becomes bound to look at the returns and report any error promptly. The rule between individuals having mutual running accounts is that an account stated becomes an account proved, if the party to whom the statement is rendered fails to show errors or mistakes in it within a reasonable time. There is a good reason for this, which this case demonstrates, for if the plaintiff had acted with promptness in checking up the returns made by the defendant, as pleaded in its answer, the fraudulent practice would have been discovered and stopped and all parties could have been protected. The failure of the government to examine these returns and report errors in time, was a cause of the successful practice, or continuance of those frauds, and was necessarily detrimental to the defendant. That failure on the part of the government counterbalances any neglect to discharge its obligation on the part of the defendant bank. There has been a loss suffered by reason of mutual neglect by plaintiff and defendant. Now, who should bear that loss? I think that the common law rule, that where there is negligence and contributory negligence the law will not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. In this case that rule leaves the loss resting upon the plaintiff. The court sustains the demurrer to the first affirmative defense and overrules it as to the second."

In the latter part of Judge Hanford's decision he says that where both parties have been negligent and a loss has occurred, the law will

not concern itself with any controversy as to who should bear the loss, but leaves the loss to rest where it falls. So it would seem that if both the government and the bank were acting in good faith and that the loss has resulted by their mutual mistakes or mutual neglect, then the loss shall remain where it has fallen.

Counsel seem to rely upon the case of *United State v. National Exchange Bank*, 214 U. S., 302, but the facts in that case are entirely different from those in this case. In that case the United States sought to recover payments made at the United States Sub-Treasury at Boston upon 194 pension checks, the signatures or marks of the persons to whom the checks were payable having been forged. Upon receipt of pension vouchers regular in form and purporting to be executed by the pensioner named therein but which in fact were forged, the United States Pension Agent at Boston drew checks upon the Sub-Treasury at Boston, aggregating \$6,362.07 in favor of the pensioners named in the vouchers and transmitted said checks by mail direct to the address of each pensioner, as given in the vouchers. The checks, with the purported endorsements thereon of the payees,

were cashed by the Exchange Bank and immediately endorsed to a National Bank at Boston for collection. The checks were presented by the collecting bank at the Sub-Treasury of the United States at Boston. The collecting bank received payment for the same and accounted for the payment to the Exchange Bank.

In this case the court held the United States could recover and at the conclusion of the opinion the court said:

"Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged endorsement having been broken at the time the checks were cashed by the United States and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which, by the operation of the legal warranty, were presumably within the knowledge of the defendant.

"The conclusion to which we have thus come renders it unnecessary to consider whether, if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery, if there was lack of such diligence it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay."

In this case the defendant paid these checks with fictitious endorsements, charged the amount

thereof to McCoy's account and promptly notified the government of such charge. The government received the accounts and vouchers and has presented them in this case. It was the duty of the government to have made a demand upon the defendant for the money and it has assumed this burden by making and pleading the demand; but it did not do so until six months after the discovery of the forgeries. The evidence shows that during all the months between the discovery of the forgeries in September, 1909, and the demand upon the bank on March 5th, 1910, the Bank of Commerce had rendered monthly statements of its accounts to the various banks from whom it received the checks in question for collection. It might have recovered the money had the notice of the forgeries been promptly given. Its recourse against these forwarding banks from whom it received the checks is now doubtful and the defendant has sustained an injury, at least to the extent of rendering it extremely doubtful as to its right of recourse against the forwarding banks.

In the case of *Exchange Bank v. United States*, 151 Fed., 407, it is said:

"None of the cases made any exception of the

kind claimed by the United States in the case at bar, namely, that the defending bank, in order to meet the demand of the United States, is bound to establish that it suffered detriment by the delay.

\* \* \* Some of the cases in discussing the matter differ as to the equities under circumstances like those before us. Some hold that the loss should be allowed to remain where it fell. However this may be, any demand for prompt notice in cases of forgeries is wholesome. When discovered, forgeries should not be coddled, but should be made known, both to the public prosecutor and to those immediately concerned; and any attempted test with reference to the question whether the party from whom recovery is sought has suffered by delay is wholly unsatisfactory, because the determination whether one who has suffered by a forgery may recoup himself is more a matter of chances, which cannot be estimated, than the result of logical investigation of particular facts.

"Consequently, if this were a case of commercial paper proper as known in the law of merchants, and between individuals, it is established that unreasonable delay in giving notice after the discovery of the forgeries would have discharged the Exchange Bank, without regard, ordinarily, to any question whether it suffered damage thereby. This, of course, is an exceptional rule, applicable to distinctly commercial paper, because with regard to liability for money paid on a signature supposed to be genuine, but forged, or paid under any other mistake, in ordinary transactions it is admittedly necessary that damage should have ensued by reason of any alleged negligence in giving notice of the facts. In conclusion as to this topic, the rule as we understand it is in entire harmony with the fundamental principles of that por-

tion of the commercial law which relates to giving parties to commercial paper notices of defaults. They insist upon promptness, but ordinarily require no proof, pro or con, on the question whether damage resulted from delay."

When the government received the periodical statements from the defendant bank and made no objection or protest against the correctness of the same for a period of more than two years, the presumption arose that the government had acquiesced in these statements and the account as between the government and the bank became a stated account and in order to evade the effect of this condition the government by the testimony admits that by the exercise of the slightest investigation it could have discovered the forgeries and fraud and could have protected itself and the bank. It therefore admits its own negligence and yet seeks to have the stated account set aside and seeks to recover from the bank for a loss occasioned by its own negligence. It repudiates the acts of its own agent, ignores all of the equities in the case and the rights of the defendant bank and seeks to take advantage of its own wrong. It has continuously refused to surrender the vouchers so that the defendant bank might proceed against the other

banks to whom it paid the money on the checks; it has acted in utter disregard of the rights of the defendant and has thrown every obstacle in the way to prevent the bank from recouping its losses by proceedings against third parties. It admits that it could have discovered the frauds, but did not do so, and yet seeks to compel the bank, an innocent party, to pay the loss sustained by the government and acquiesced in for a period of more than three years. It clothed McCoy with the power to draw the checks upon the defendant and with full knowledge of the drawing of such checks and their payment by the bank, the government stood by and exerted its utmost efforts to prevent the bank from recovering the money from third parties and has rendered it impossible for the bank to successfully prosecute any action against third parties for the recovery of the sums in controversy, by withholding the checks. It has disregarded the universal rule requiring a party who receives forged instruments to immediately give notice of the forgeries upon their discovery, and to return the documents.

If ever a case existed where the rule of law requiring the loss to remain where it falls should

be enforced, this is such a case. Even though for the sake of argument it might be conceded that the bank should not have paid out the money without a more strict identification of the payees and was, therefore, guilty of some negligence, still the laches, and delays, and refusal to return the documents on the part of the government rendered the government guilty of contributory negligence and the action of the lower court in granting the non-suit was clearly justified by the record in the case and by the law. The action of the lower court in granting the motion for non-suit and in dismissing the action was correct and should be affirmed.

Respectfully submitted,

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